

Modern Reports,
O R,
SELECT CASES
Adjudged in the
COURTS

England
O F
King's-Bench, Chancery, Common-Pleas, and
Exchequer, since the Restauration of

HIS MAJESTY
King Charles II.

Collected by a Careful Hand.

The Second Edition, with References never
before Printed.

L O N D O N,

Printed by the Assigns of Richard and Edward
Atkyns Esquires, for Samuel Heyrick, Richard Chif-
wel, W. Battersby, Sam. Keble, and M. Wotton, 1700.



T H E
PUBLISHER
T O T H E
R E A D E R.

T Hese Reports (*the first except the Lord Chief Justice Vaughan's Arguments that have been yet Printed of Cases adjudged since his Majesty's happy Restauration*) though they are not Published under the Name of any Eminent Person, as some other Spurious Ones have been, to gain thereby a Reputation which in themselves they could not Merit; yet have been Collected by a Person of Ability and Judgment, and Communicated to several of known Learning in the Laws, who think them not Inferior to many Books of this Nature, which are admitted for Authority. A great and well-spread Name may be Requisite to render a Book Authentick, and to defend it from that common Censure, of which this Age is become so very liberal. But its own worth is that only which can make it Useful and Instructive.

The Reader will find here several Cases (as well such as have been Resolved upon our Modern Acts of Parliament, as others relating to the Common-Law) which are *primæ Impressionis*, and not to be found in any of the former Volumes of the Law; and the Pith and Substance of divers Arguments, as well as Resolutions of the Reverend Judges, on many other weighty and difficult Points.

A 2

And

The P R E F A C E.

And indeed, though in every Case the main thing which it behoves Us to know, is, what the Judges take and define to be Law: yet the short and concise way of reporting it, which is affected in some of our Books, doth very scantily answer the true and proper end of reading them; which is not only to know what is Law, but upon what Grounds and Reasons 'tis adjudged so to be; otherwise the Student is many times at a loss, and left in the dark; especially where he finds other Resolutions which seem to have a tendency to the contrary Opinion.

In this respect, these Reports will appear to be more satisfactory and enlightning than many others; several of the Cases (especially those of the most important Consideration) containing in a brief and summary way what hath been offered by the Counsel Pro and Con, and the Debates of the Reverend Judges, as well as their Ultimate Resolutions; than which nothing can more contribute to the Advantage of the studious Reader, and to the settling and guidance of his Judgment, not only in the Point controverted, but likewise in other matters of Law, where the Reason is the same. Ubi eadem ratio, idem jus.

As to the truth of these Reports, though the modesty of the Gentleman who collected them, hath prevailed above the importunity of the Book-Seller, and he hath rather chosen to see his Book, than himself gain the Publick Acceptation and Applause, whereby it hath lost some seeming Advantage, which the prefixing of his Name would have undoubtedly given it; yet the Reader may rest assured that no little Care hath been taken to prevent any Mistakes or Mis-representations. The Judgments having been examined, and the Authorities here cited industriously compared with the Books out of which they were taken.

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R E-

REPORTS

Of divers

Select Cases

In the Reign of

CAROLI II.

Term Mich. 21 Car. II. 1669. in Banco Regis.

ONE Mynn an Attorney entred a Judgment, (1.)
by colour of a Warrant of Attorney, of another Term than was expessed in the Warrant; The Court consulting with the Secondary about it, he said, That if the Warrant be to appear and enter Judgment as of this Term or any time after, the Attorney may enter Judgment at any time during his life; but in the case in question the Warrant of Attorney had not those words, or at any time after: Wherefore the Secondary was ordered to consider the charge of the party grieved, in order to his reparation. Which the Court said concluded him from bringing his Action on the Case.

The Secondary said, That in Trin. & Hill. Term they (2.)
could not compel the party in a Habeas Corpus to plead and Tryals.
go to Trial the same Term, but in Michaelmas and Easter-Term they could.

(3.) *Enquest.* Mr. Solicitor moved for a new Writ of Enquiry into London, and to stay the filing of a former, because of excessive Damages given; but it was denied.

(4.) *Vish.* An Affidavit for the changing of a Venue made before the party was Arrested, and allowed.

(5.) *Maihm.* *1 Rol. 335.* *pl. 14.* Moved in Battery for putting an Arm out of joint, that the party might be held to special Bail; but denied. Twisd. Follow the course of the Court.

(6.) *Apprentice* *8 Eliz. 4. Exp.* *38. N. 3.* Mr. Sanders moved to quash an Order made by the Justices of Peace for putting away an Apprentice from his Master and ordering the Master to give him so much Money. Keeling. The Statute of 5 Eliz. leaves this to their discretion.

(7.) *Franchis.* An Indictment was preferred in Chester for a Perjury committed in London: For which Keeling threatened to have the Liberties of the County Palatine seized, if they kept not within their bounds.

Goodwin & Harlow.

(8.) *1 Rol. 888.* **E**rror to reverse a Judgment in Colchester, there being no appearance by the party, but Judgment upon three Defaults recorded. Reversed.

Twisd. If there be a Judgment against three, you cannot take out Execution against one or two.

(9.) *Heir.* Upon a motion for a new Trial Twisd. said, That in his practice the Heir in an Action of Debt against him upon a Bond of his Ancestor, pleaded riens per discent; the Plaintiff knew the Defendant had levied a Fine, and at the Trial it was produced: but because they had not a Deed to lead the uses, it was urged that the use was to the Conusor, and his heirs, and so the Heir in by descent: whereupon there was a Verdict against him; and it being a just and due Debt, they could never after get a new Trial.

Gostwicke

Gostwicke & Mason.

DEBT for Rent upon a Lease for a year, and so from year to year, quamdiu ambabus partibus placuerit; ^(10.) 2 Keb. 543. there was a Verdict for the Plaintiff for two years rent. Sanders moved in Arrest of Judgment, that the Plaintiff alledges indeed that the Defendant entered and was possessed the first year, but mentions no Entry as to the second. Twissd. The Jury have found the Rent to be due for both years, and we will now intend that he was in possession all the time for which the Rent is found to be due.

A Prohibition was prayed to the Ecclesiastical Court at Chester to stay proceedings upon a Libel against one William Bayles, for teaching School without Licence; but it was denied. ^(11.) Schools.

Redman & Edolfe.

TRespass and Ejectment by Original in this Court. Sanders moved in Arrest of Judgment, upon a fault in the Original: for a bad Original is not help'd by Verdict. ^(12.) 2 Keb. 544. 1 Sand. 317. 5 Co. 37. a. But upon Mr. Livesey's certifying that there was no Original at all, the Plaintiff had Judgment, though in his Declaration he recited the Original.

In an Action of Assault and Battery and Wounding; the Evidence to prove a Provocation, was, That the Plaintiff put his hand upon his Sword and said, If it were not Assize time I would not take such Language from you: The question was, if that were an Assault? The Court agreed that it was not: for he declared, that he would not Assault him the Judges being in Town; and the intention as well as the act makes an Assault. Therefore if one strike another upon the hand or arm, or breast, in discourse, its no Assault, there being no intention to Assault: But if one intending to Assault, strike at another and miss him this is an Assault: so if he hold up his hand against another and say nothing, it is an Assault. In the principal case the Plaintiff had Judgment. ^(13.) 2 Keb. 545. 2 Rol. 545. pl. 10.

Medlicott & Joyner.

14.
2 Keb. 546.
10 Co. 92. b.
93. a.

1 Co. 124. a.
9 Co. 106. a. b.
10 Co. 99. a.
98. b.
Plowd. 373.
1 Cr. 577.

Ejectione firmæ. The Plaintiff at the Trial offer'd in Evidence a Copy of a Deed that was burnt by the Fire; the Copy was taken by one W. Gardner of the Temple, who said he did not examine it by the Original, but he writ it, and it always lay by him as a true Copy: and the Court agreed to have it read; the original Deed being proved to be burnt. Twisd. Feoffee upon Condition is disseised, and a Fine levied, and five years pass; then the Condition is broken: the Feoffor may enter, for the Disseisor held the Estate subject to the Condition, and so did the Conizee, for he cannot be in of a better Estate than the Conisor himself was.

Dawe & Swayne.

15.
2 Keb. 546.

Hob. 267.

1 Rol. 103.

An Action upon the Case was brought against one for suing the Plaintiff in placito debiti for 600 l. and falsely and maliciously affirming to the Bailiff of Westminster, that he did owe him 600 l. whereby the Bailiff insisted upon extraordinary Bail, to his Damage, &c. The Defendant traverses, abique hoc that he did falsely and maliciously affirm to the Bailiff of Westminster that he did owe him so much. Winnington moved in Arrest of Judgment, that the Action would not lie; But the Plaintiff had Judgment. Keel. If there had been no cause of Action, an Action upon the case would not lie, because he has a recompence by Law, but here was a cause of Action. If one should arrest you in an Action of 2000 l. to the intent that you should not find Bail, and keep you from practice all this Term, and this is found to be falsely and maliciously, shall not you have an Action for this? This Twisd. said he knew to have been Serjeant Rolls his Opinion. Morton; Foxley's case is, That if a man be outlaw'd in another County, where he is not known, an Action upon the Case will lie; so an Action lies against the Sheriff, if reasonable Bail be offered and refused.

Twisd.

Twifden. If three men bring an Action, and the Defendant put in Bail at the Suit of four, they cannot declare; Bail. but if he had put in Bail at the Suit of one, that one might declare against him.

Judgment was entered as of Trinity Term for the Queen Mother, and a Writ of Enquiry of Damages was taken out returnable this Term, and she died in the Vacation-time; Resolved, that the first was but an interlocutory Judgment, and that the Action was abated by her death. Twifd. Some have questioned how you shall come to make the death of the party appear between the Verdict, and the day in Bank; and I have known it offer'd by Affidavit, and by Suggestion upon the Roll, and by motion.

16.

17.

1 Leon. 263.

2 Keb. 584.

Post. 6. pl. 19.

Hob. 129.

4 Co. 39. b.

1 Keb. 477.

1 Sid. 131.

Troy an Attorney.

AN Information of Extortion against Troy an Attorney; It was moved in arrest of Judgment, That Attorneys are not within any of the Statutes against Extortion, and therefore the Information concluded ill, the conclusion being contra formam Statuti. Twifd. The Statute of 3 Jac. c. 7. is express against Attorneys. Keel. I think as thus advised, that Attorneys are within all the Statutes of Extortion. It was afterwards moved in arrest of Judgment, because the Information was insufficient in the Law: for Sir Tho. Fanshaw informed, that M^r. Troy being an Attorney of the Court of Common Pleas, did at Maidstone cause one Collop to be impleaded for 9 s. 4 d. Debt, at the Suit of one Dudley Sellinger, &c. and this was ad grave damnum of Collop, &c. but it is not expressed in what Court he caused him to be impleaded; and that which the Defendant is charged with is not an Offence, for he saith that he did cause him to be impleaded, and received the Money the same day, and perhaps he received the Money after he had caused him to be impleaded: Then it is not sufficiently alledged that he did illicite receive so much, and Extortion ought to be particularly alledged. Nor is there any Statute, that an Attorney shall receive no more than his just fees. The profession of an Attorney is at Common Law, and allowed by the Statute of Westm. 1. c. 26. and the Sta-

18.

Statute of 3 Jac. does not extend to this matter. Non constat in this case, if what he received was for fees or no: besides the suit for an offence against that Statute must be brought by the party, not by Sir Tho. Fanshawe. Keel. If the party grieved will not sue for the penalty of treble damages given by that Statute; yet the King may prosecute to turn him out of the Roll. Twiss. I doubt that: nor is it clear, whether an Information will lie at all upon that Statute or not, for the Statute does not speak of an Information. Keel. Whenever a Statute makes a thing criminal, an Information will lie upon the Statute, though not, given by express words. Twiss. It appears here, that this money was not received, of his Client, for he was against Collop. But he ought to shew in what Court the impleading was; for otherwise it might be before Mr. Major in his Chamber. To which the Court agreed. So the Information was quash'd.

10 Co. 75. b.

Burnet & Holden.

(19) **T**HERE were these two Points in the case. 1. If the Defendant dye after the day of Nisi prius, and before the day in Bank, whether the Judgment shall be said to be given in the life of the Defendant? 2. Admit it shall, yet whether the Executor shall have the advantage taken from him, of retaining to satisfy his own debt. To the first it was said that the Act of Parliament only takes away a Writ of Error in such case, but there is no day in Bank to plead. It was order'd to stand in the Paper. *And so 177. to judgment*

Ante 5. pl. 17.

Corporation of Darby.

(20.) **T**HE Corporation of the Town of Darby prescribe to have Common fans number in grosse. Sanders. I conceive it may be by prescription: what a man may grant, may be prescribed for; Co. Lit. 122. is express. Keel. In a Forest the King may grant Common for Sheep, but you cannot prescribe for it. And if you may prescribe for Common fans number in grosse, then you may dye all the Cattel in a Fair to the Com.

1 Sand. 343.

Common. Sanders. But the prescription is for their own Cattel only. Twissd. If you prescribe for common fans number appurtenant to Land, you can put in no more Cattel than what is proportionable to your Land; for the Land limits you in that case to a reasonable number. But if you prescribe for common fans number in grosse, what is it that sets any bounds in such case? There was a case in Glyn's time between Massfelden and Stoneby, where Massfelden prescribed for common fans number, without saying levant & couchant, and that being after a Verdict, was held good; but if it had been upon a Demurrer, it would have been otherwise: Livesey said he was agent for him in the case.

Bucknall & Swinnock.

INdebitat. Assumpsit for money received to the Plaintiffs use; the Defendant pleads specially, that post assumptionem predictam there was an agreement between the Plaintiff and Defendant, that the Defendant should pay the money to J.S. and he did pay it accordingly. The Plaintiff demurs. Jones. This plea doth not only amount to the general issue, but is repugnant in it self. It was put off to be argued.

(21.)

2 Keb. 440.

Infra 69. pl. 20.

2 Keb. 553.

Hall versus Wombell.

The question was, whether an Action of Debt would lie upon a Judgment given by the Commissioners of Exchequer upon an Information before them. Adjournatur.

(22.)

Debt.

Vaughan & Casewel.

A Writ of Error was brought to reverse a Judgment given at the grand Sessions in Wales, in a Writ of Qd. ei de forceat. Sanders. The point in Law will be this; whether a Tenant's vouching a Vouchee out of the line, be peremptory and final, or that a Respond' ouster shall be awarded?

(23.)

2 Keb. 553.

M.

8 Co. 50. a.
2 Inst. 411.

Mr. Jones. In an Assize the Tenant may vouch another named in the Writ, 9 H. 5. 14. and so in the Com. f. 89. b. but a Voucher cannot be of one not named in the Writ, because it is festinum remedium. In Wales they never allow foreign Vouchers, because they cannot bring them in. If there be a Counterplea to a Voucher, and that be adjudged in another Term, it is always peremptory; otherwise, if it be determined the same Term.

2 Inst. 242,
243, 367.

An Action of Trover and Conversion was brought against Husband and Wife, and the Wife arrested. Twild. The Wife must be discharged upon Common Bail: So it was done in the Lady Baltinglasse's Case. And where it is said in Crook, that the Wife in such case shall be discharged, it is to be understood that she shall be discharged upon Common Bail. So Livesey said the course was.

(25.)

It was said to be the course of the Court, That if an Attorney be sued time enough to give him two Rules to plead within the Term, Judgment may be given, otherwise not.

Ruffel & Collins.

(26.)

AN Assumpsit was brought upon two several Promises, and entire Damages were given. Moved by Mr. Sympson in arrest of Judgment, that for one of the promises an Action will not lie: It was a general indubitatus pro opere facto; which was urged to be too general and uncertain. But per Curiam it is well enough, as pro mercimoniis venditis & pro servicio, without mentioning the Goods or the Service in particular. And the Plaintiff had Judgment.

2 Cro. 207.
Hob. 5.

Dyer versus East.

AN Action upon the Case upon a Promise for Wares that the Wife took up for her wearing Apparel; Pollexfen moved for a new Trial. Keel. The Husband must pay for the Wives Apparel, unless she does Clope, and he give notice not to trust her: that is Scott and Manby's Case: which was a hard Judgment, but we will not impeach it. The Plaintiff had Judgment. (27.)
Post 124, 143.

Beckett & Taylor.

DEbt upon a Bond to submit to an Award. Exception was taken to the Award, because the concurrence of a third person was awarded, which makes it void: They award that one of the Parties shall discharge the other from his undertaking to pay a Debt to a third person: and it was pretended that the third person being no Party to the submission, was not compellable to give a discharge. But it was answered that he is compellable, for in case the debt be paid him, he is compellable in Equity to give a Release to him that had undertaken to pay it. Rolls 1 part 248. And Giles and Southwards Case, Mich. 1653. Judgment nisi. (28.)
2 Keb. 546.
1 Cro. 541.

Seventeen Serjeants being made the 4th of November, a day or two after Serjeant Powis, the Junior of them, all coming to the Kings-Bench Bar, the Lord Chief Justice Keeling told him, that he had something to say to him, Viz. That the Rings which he and the rest of the Serjeants had given, weighed but 18 s. a-piece; whereas Fortescue in his Book De Laudibus Legum Angliæ says, That the Rings given to the Chief Justices, and to the Chief Baron, ought to weigh 20 s. a-piece: And that he spake this not expecting a Recompence, but that it might not be drawn into a Preident; and that the young Gentlemen there might take notice of it. (29.)
2 Keb. 552.

Clerke *versus* Rowell & Phillips.(30.)
Sand. 319.

A Trial at Bar in Ejectment for Lands settled by Sir Pexal Brockhurst. The Court said, a Trial against others shall not be given in Evidence in this cause. And Twissden said, that an Entry to deliver a Declaration in Ejectment should not work to avoid a fine; but that it must be an express Entry. Upon which last matter the Plaintiff was nonsuit.

Redman's Case.

(31.)

It was moved, that one Redman an Attorney of the Court, who was going into Ireland, might put in special Bail. Twissd. A Clerk of the Court cannot put in Bail. You have filed a Bill against him, and so waived his putting in Bail. Keel. You may remember Woolley's Case; that we discharged him by reason of his Privilege, and took Common Bail. Twissd. You cannot declare against him in custodia. But though we cannot take Bail, yet we may commit him, and then deliver him out by mainpernancy. Jones. If he be in Court in propria persona, you cannot proceed against his Bail. The Court agreed that the Attorney should not put in Bail.

Grafton.

(32.)

Grafton, one of the Company of Drapers, was brought by Habeas Corpus. In the Return, the cause of his Imprisonment was alledged to be, for that being chosen of the Libery, he refused to serve. Per Cur' they might have fined him, and have brought an Action of Debt for the sum: but they could not imprison him. Keel. The Court of Aldermen may imprison a Man that shall refuse to accept the Office of Alderman, because they are a Court of Record, and they may want Aldermen else. So he was released.

Sid. 288.

It

It was moved for the Plaintiff, that a person named in the simul cum being a material Witness, might be struck out, and it was granted. Keel. said, That if nothing was prov'd against him, he might be a Witness for the Defendant. (33.)
Infra 16. pl. 45.

Clerke & Heath.

Ejectione firmæ. The Plaintiff claims by a Lease from Th. Prin, Clerke. Objected, That Prin had not taken the Oath according to the Act for Uniformity; whereupon he produced a Certificate of the Bishop that had only a small bit of Wax upon it. Twiss. If it were sealed, though the Seal be broken off, yet it may be read, as we read Recoveries after the Seal broken off; and I have seen Administration given in Evidence after the Seal broken off, and so Wills and Deeds. Accordingly it was read. Obj. The Church is ipso facto void by the Act of Uniformity, if the incumbent had no Episcopal Ordination. So they shewed that Prin was Ordained by a Bishop. It was likewise proved that he had declared his assent and consent to the Common Prayer in due time, before St. Bartholomew's day. Then it was urged that the Act does not confirm the Plaintiff's Lessor in this Living; for that it is not a Living with Cure of Souls; for it has a Vicarage endowed. Twiss. If it be a Living without Cure, the Act does not extend to it. Mr. Solicitor. The Presentation does not mention Cure of Souls. (So they read a Presentation of a Rector and another of a Vicar, in neither of which any mention was made of Cure of Souls: but the Vicar's was residendo.) If both be presentative, the Cure shall be intended to be in the Vicar. Keeling. Why may not both have the Cure? Sol. If the Vicar be endow'd, the Rector is discharged of Residence by Act of Parliament. Twiss. Synodals and Procurations are Duties due to the Ordinary; which Vicars, when the Parsonages are impropriated, always pay: but I question whether they that come into a Church by Presentation to, and institution by the Bishop, have not always the Cure of Souls? It is true in Donatives, where the Ministers do not come in by the Bishops Institution, there is no Cure: But they that come in by Institution of the Bishop, have their power delegated to them from him, and
C 2 gene.

(34.)
2 Keb. 556.

Larch. 226.

2 Co. 44.

generally have Cure of Souls. Solic. There are several Rectories without Cure. Twisd. When came Rectories in? Moreton. After the Counsel of Lateran, and Vicars came in in the Seventeenth year of King John. Before the Council of Lateran, the Bishop did provide Teachers, and received the Tythes himself; but since he hath appointed others to the Charge, and saith, accipe curam tuam & meam. Keeling and Twisden. It is said so by my Lord Coke, but not done. Twisden. Wherever there is a Cure of Souls, the Church is visitable either by the Bishop, if it belongs to him: If to a Lay man, he must make Delegates: If to the King, my Lord Keeper does it. And where a Man comes in by Presentation, he is prima facie visitable by the Bishop. Keeling. I take it, that whoever comes in under the Bishop's Institution, hath the Cure. Twisden. Grendon's Case is expressly, That the Bishop hath the Cure of Souls of all the Diocess, and doth by institution transfer it to the Parson: so that prima facie, he that is instituted hath the Cure. The Vicarage is derived out of the Parsonage; and if the Vicar come to poverty, the Parson is bound to maintain him. Twisd. There is an Appropriation to a Corporation; the Corporation cannot have Cure of Souls, being a Body Politick; but when they appoint a Vicar, he coming under the Bishop by Institution, hath Cure of Souls: and a Donative, when it comes to be Presentative, hath Cure of Souls. Keeling. agreed. Twisd. We hold that when the Rector comes in by Institution, the Bishop hath power to visit him for his Doctrine and his Life; for he hath the particular Cure, but the Bishop the general; and that the Bishop hath power to deprive him.

Abbot & Moore.

(35.)

THE Plaintiff declares, That whereas one Will. Moore was indebted to him in 210l. and whereas the said Will. Moore had an Annuity out of the Defendants Lands. That the Defendant in consideration that the Plaintiff had agreed that the Defendant should pay so much Money to the Plaintiff, the Defendant did promise to pay it. After a Verdict

But, it was objected in arrest of Judgment, that here was not any consideration; and the Court was of that Opinion. Then the Plaintiff would have discontinued; but the Court would not suffer that after a Verdict.

1 Sand. 210,
211. 1 Ro. 27.
pl. 50. 29. pl. 60.
31 pl. 5. 1 Cr.
575.

Sir Edward Thurland, moved to quash an Order made by the Justices of the Peace for one to serve as Constable in Homeby. Moreton. If a Leet neglect to chuse a Constable, upon complaint to the Justices of Peace, they shall by the Statute appoint a Constable. Twiss. In this case there are Affidavits, that there never was any Constable there. And I cannot tell whether or no the Justices of Peace can erect a Constablewick where never any was before: if he will not be sworn let them indict him for not executing the Office, and let him traverse, that there never was any such Office there. Keeling. So and be sworn, or if the Justices of the Peace commit you, bring your Action of false Imprisonment. Twiss. If there be a Court Leet that hath the choice of a petty Constable, the Justices of Peace cannot chuse there: And if it be in the Hundred, I doubt whether the Justices of Peace can make more Constables than were before. High Constables were not at origine, but came in with Justices of Peace. 10 H. 4. Keel. and Moreton, cont. Moreton. The Book of Villarum in the Exchequer sets out all the Tills, and there cannot be a Constablewick created at this day. In this case the Court ordered him to be sworn. Thurl. If they chuse a Parliament-mans Servant Constable, they cannot swear him. Twiss. I do not think the Priviledge extends to the Tenant of a Parliament-man, but to his Servant. (36.)

Blisset & Wincot.

TWO Persons committed for being at a Conventicle, were brought up by Habeas Corpus. Twiss. 2 Keb. 558. To meet in Conventicles in such numbers as may be affrighting to the People, and in such numbers as the Constable cannot suppress, is a breach of the Peace, and of a persons Recognizance for the good behaviour. Note, this was after the late act against Conventicles expired. And hence forward Informations to be used with fines, &c. (37.)

16 Car. 2. cap. 4.

Lee

Lee & Edwards.

(38.)
2 Keb. 559.

AN Action upon the Case was brought upon two Promises. 1. In consideration the Plaintiff would bestow his labour and pains about the Defendants Daughter, and would cure her, he did promise to pay so much for his labour and pains, and would also pay for the Medicaments. 2. That in consideration he had cured her, he did promise to pay, &c. Raymond moved in arrest of Judgment, that he did not aver that he had cured her; the consideration of the first Promise being future, and both Promises found, and intire Damages given. Twifd. It is well enough; for now it lies upon the whole Record, whether he hath cured her or no: if it had rested upon the first Promise, it had been naught. And in the second Promise there is an averment, that he had cured her. So that now after a Verdict it is help'd, and the want of an averment is holpen by a Verdict in many Cases. Judgment, nisi, &c.

(39.)
3 Co. 72. b.

Twifd. If a Man be in Prison, and the Marshal dye, and the Prisoner Escape, there is no remedy but to take him again.

(40.)

Twifd. Pleas in abatement come too late after imparlance.

Hall & Sebright.

(41.)
2 Keb. 501.Hob. 35.
Moor 861.

AN Action of Trespass wherein the Plaintiff declared, That the Defendant on the 24th of January, did enter and take possession of his House, and did keep him out of possession to the day of the exhibiting the Bill; The Defendant pleads, that ante præd. tempus quo, &c. the Plaintiff did licence the Defendant to enjoy the House until such a day. Saunders. The Plea is naught in substance: for a Licence to enjoy from such a time, to such a time, is a Lease, and ought to be pleaded as a Lease, and not as a Licence: it is a certain present Interest. Twifden. It is true 5 H. 7. f. 1. is That

That if one doth licence another to enjoy his House till such a time, it is a Lease; but whether it may not be pleaded as a Licence, I have known it doubted. Judgment nisi, &c.

Coppin *versus* Hernall.

TWISDEN said upon a Motion in arrest of Judgment, because an Award was not good, that the Imprize could not be made, till the Arbitrators time were out: And if any such power be given to the Ampire, its naught in its constitution, for two persons cannot have a several Jurisdiction at one and the same time, (41.)
2 Keb. 562.
2 Sand. 129.
130.
1 Sid. 455.
Post. 274.
1 Rol. 261.

The Law allows the Defendant a Copy of the Pannel to provide himself for his Challenges. (42.)
Enquest.

Fettiplace *versus* ----

Action upon the Case upon a Promise, in consideration that the Plaintiff would asseerere instead of asserre, &c. it was moved in arrest of Judgment: & Cro. 3 part. 466. was cited Bedel & Wingfield. Twisd. I remember districtionem for destructionem, cannot be helped: so neither vaccaria instead of vicaria. So the Court gave directions to see if it were right upon the Roll. (43.)
Co. 45. a.

Holloway.

THE Condition of a Bond for performance of Covenants in an Indenture, doth esop to say there is no such Indenture, but doth not esop to say there are no Covenants. (44.)
2 Keb. 564.
1 Sand. 316.
Moor 420.
1 Rol. 872.
2 Cro. 375.
Allen 52.

Keel.

(45.)

Supra 11.
Pl. 33.

Keel. The course of the Court is, that if a Man be brought in upon a Latitat for 20 l. or 30 l. we take the Bail for no more, but yet he stands Bail for all Actions at the same Parties Suit; otherwise if a Stranger bring an Action against him. Twisd. They cannot declare till he hath put in Bail, and when we take Bail, it is but for the Sum in the Latitat, perhaps 30 l. or 40 l. but when he is once in, he may be declared against for 200 l.

Smith *versus* Wheeler.

(46.)

Vent. 128.

A Writ of Error was brought to reverse a Judgment given in the Common-Pleas, upon a special Verdict in an Ejectione firmæ. The Jury found that one Simon Mayne was possessor of a Rectory for a long term, and having conveyed the whole term in part of it to certain persons absolutely, he conveyed his term in the residue, being two parts, in this manner; *sc.* in trust for himself during Life, and afterwards in trust for the payment of the Rent reserved upon the original Lease, and for several of his Friends, &c. Provided, that if he should have any issue of his Body at the time of his death, then the Trusts to cease, and the Assignment to be in trust for such issue, &c. and there was another Provision, that if he were minded to change the uses, or otherwise to dispose of the premises, that he should have power so to do by writing in the presence of two or more Witnesses, or by his last Will and Testament. They farther find, that he had Issue Male at the time of his death, but made no disposition pursuant to his power: and that in his Life-time he had committed Treason, and they find the Act of his Attainder. The Question was, Whether the rest of the term that remained unexpired at the time of his death, were forfeited to the King? The Points made were two. 1. Whether the Deed were fraudulent? 2. Whether the whole term were not forfeited by reason of the trust, or the power of Revocation. Pemberton argued, that the Deed was fraudulent, because he took the profits during his Life, and the Assignees knew not of the Deed of trust. The Court hath in these Cases adjudg'd fraud upon circumstances appearing upon Record, without any Verdict: the Case that comes nearest to this, is in Lane 42, &c. The King against the

the Earl of Nottingham and others. 2dly, He argued, that there was a Trust by exprels words ; and if there be a Trust, then not only the Trust, but the Estate, is vested in the King by the exprels words of the Stat. of 33 H. 8. The King indeed can have no larger Estate in the Land, than the person attainted had in the Trust ; and if this Condepance were in Trust for Simon Mayne only during his life, the King can have the Land no longer ; but he conceived it was a Trust for Simon Mayne during the whole term. A Trust, he said, was a right to receive the profits of the Land, and to dispose of the Lands in Equity. Now if Simon Mayne had a right to receive the profits, and a present power to dispose of the Land he took it to be a Trust for him : and that consequently by his attainer it was forfeited to the King. Coleman contra : As for the matter of fraud, first, there is no fraud found by the Jury, and for you to judge of fraud upon Circumstances, is against the Chancellor of Oxford's Case, 10th Rep. As for the Trust, it must be agreed, that if there be either any Trust or Condition by construction upon these Provisoes in Simon Mayne in his life, between Mich 1646. and the time of making the Act, the Trust will be vested in the King : but whether will it be vested in the King, as a Trust or as an Estate ? For I am informed that it hath been adjudged between the King and Holland, Styles Reports ; That if an Alien purchase Copyhold Lands, the King shall not have the Estate, but as a Trust ; and the particular reason was, because the King shall not be Tenant to the Lord of the Mannor. Keeling. The Act of Parliament takes the Estate out of the Trustees, and puts it in the King. Coleman. But I say here is no Trust forfeitable. By the body of the Deed all is out of him. If a man makes a feoffment in fee to the use of his Will, because he hath not put it out of him, there arises an Use and a Trust for himself. But in our case, he hath put the Uses out of himself : for there are several Uses declared. But there is a further difference : if Simon Mayne had declared the Use to others absolutely, and had reserved liberty to himself to have altered it by his Will, that might have altered the case : But here the Proviso is, That if at the time of his death he shall have a Son, &c. so that it is reduced to him upon a Condition and Contingency. As to the power of Revocation, he cited the Duke of Norfolk's case in Englefields case ; which Twiss said came strongly to this. Adjourned. V. infr. 38. pl. 89.

*15th. 20. 30. Dubh.
1 Roll. 194.
Allen 14, 15. Dubh.
proposed Mary (sister) of the King.*

(47.)
Pleading.

An Informallon was exhibited against one for a Libel. Coleman. The party has confessed the matter in Court, and therefore cannot plead not guilty. Twisd. You may plead not guilty with a relicta verificatione.

Horn & Ivy.

(48.)
Siderfin 472.
1. Roll 147.
2. Roll 567.
cont.

TResp. for taking away a Ship. The Defendant justifies under the Patent, whereby the Canary Company is incorporated and granted, that none but such and such should Trade thither, on pain of forfeiting their Ships and Goods, &c. and says, that the Defendant did Trade thither, &c. the Plaintiff demurs. Polyxsen. He ought to have shown the Deed whereby he was authoriz'd by the Company to seize the Goods: 26 H. 6. 8. 14. Ed. 4. 8. Bro. Corp. 59. though I agree, that for ordinary Employments and Services, a Corporation may appoint a Servant without Deed, as a Cook, a Butler, &c. Plo. Com. 91. A Corporation cannot Licence a stranger to sell Cakes without Deed: 12 H. 4. 17. Nor can they make a Disseisor without Deed, nor deliver a Letter of Attorney without Deed. 9 Ed. 4. 59. Bro. Corp. 24. 34. 14 H. 7. 1. 7 H. 7. 9. Rolls 514. tit. Corporation, Dr. Bonham's Case. Again, the plea is double: for the Defendant alledgeth two causes of a breach of their Charter, viz. their taking in Wines at the Canaries, and importing them here: which is double. Then there is a clause that gives the forfeiture of Goods and Imprisonment, which cannot be by Patent: 8 Co. 125. Waggoner's Case. Noy 123. in the Case of Monopolies. This Patent I take also to be contrary to some Acts of Parliament, viz. 9 Ed. 3. cap. 1. 2 Ed. 3. cap. 2. 2 Rich. 2. cap. 1. 11 Rich. 2. cap. 2. and these Statutes the King cannot dispence withal by a Non obstante. Twisd. For the first point, I think they cannot seize without Deed, no more than they can enter for a Condition broken without Deed. Keel. We desire to be satisfied whether this be a Monopoly or not. It was ordered to be argued.

1 Roll. 514.K.

Pryn.

Pryn versus Smith.

Scire Facias in this Court, upon a Recognizance by way of Bail upon a Writ of Error in the Exchequer Chamber. The Defendant pleaded, that the Plaintiff did after Judgment sue forth a Capias ad satisfaciend. out of this Court to the Sheriff of Middlesex, whereupon he was taken in Execution, and suffered to escape by the Plaintiffs own consent. Jones. We have demurred because they do not lay a place where this Court was holden, nor where the Plaintiff gave his consent. (49.)

Redman & Pyne.

An Action upon the Case was brought for speaking these words of the Plaintiff, being a Watch-maker, viz. He is a bungler, and knows not how to make a good piece of work: but there was no colloquium laid of his Trade. Pemberton. The Jury have supply'd that, having found that he is a Watch-maker. And it is true, that words shall be taken in mitiori sensu: but that is when they are doubtful: Caudry's Case: 1 Cro. 196. Twisden. I remember a Shoe-maker brought an Action against a man, for saying that he was a Cobler: And though a Cobler be a Trade of it self, yet held that the Action lay, in Glyn's time. Saunders. If he had said that he could not make a good Watch, it would have been known what he had meant: but the words in our case are indifferent, and perhaps had no relation to his Trade. Ordered to stay. (50.)

Vere & Reyner

An Action upon the Case upon a promise to carry duas carectatas, &c. Rotheram. It's uncertain whether carectata signifies a Horse-load, or a Cart-load: Judgment nisi, &c. (51.)

(52.) Twifden. I have known, if a Judgment be given, and
 Infra 24. pl. 62 there is an agreement between the Parties not to take out
 Execution till next Term, and they do it before, that the
 Court has set all aside.

(53.) One brought up by Habeas Corpus out of the Cinque-
 Cinque Ports, upon an Information for breaking Prison, where he was
 Ports. in upon an Execution for Debt. Barrell moved against it.
 Twifd. Suppose a man be arrested in the Cinque-Ports, for a
 matter arising there, and then another hath cause to arrest him
 here, is there not a way to bring him up by Habeas Corpus?
 Barrell. It was never done, but there has been a Habeas Cor-
 pus thither ad faciend. & recipiend. Keel. If a man be in Pri-
 son in the Fleet, we bring him up by Habeas Corpus, in case
 2 Cro. 543. there be a Suit against him here Twifd. Where shall such a
 man be sued, upon a matter arising out of the Cinque-ports?
 Barrell. If it be transitory, he must be sued there; if local, else-
 where. Twifd. Then you grant, if local, that there must be
 a Habeas Corpus. And so it was allowed in this case.

(54.) Two Justices of Peace made an Order, in Session
 time, against one Reignolds, as reputed Father, for the keep-
 ing of a Bastard-child: Reignolds appealed to the same Ses-
 sions, where the Justices made an Order that one Burrell
 should keep it. Jones moved to set aside this Order, though
 an Order of Sessions upon an Appeal from two Justices; be-
 cause he said the first Order being made in Session time, that
 Sessions could not be said to be the next within the Stat. of
 18 Eliz. and because the Justices at the Sessions, did not
 quash the Order made by two Justices. Keel. They ought
 to have done that. Twifd. They may vacat the first Order,
 and refer it back to two Justices as res integra. The
 Order being read, one clause of it was, that Burrell should
 pay 12 d. a week for keeping the Child, till it came to be
 twelve years of age: which Twifden said was ill, for it
 ought to be so long as it continues chargeable to the Parish:
 The parties were bound over to appear at the next Assizes
 in Essex.

Darbyshire *versus* Cannon.

Sympson moved, that the Defendant having submitted to a Rule of Court for referring the matter, and not performing the Award, an Attachment might be granted against him. Which was granted: but when the party comes in upon the Attachment, he may alledge, that the Award is void; and if it appear to be so, he shall not be bound to perform it. (55.)
2 Keb. 575.

Owen Hannings.

In a Trial at Bar upon a Scire facias to avoid a Patent of the Office of Searcher, exception was taken to a Witness, that he was to be Deputy to the party that would avoid the Patent. Twissd. If a man promise another, that if he recover his Land, the other shall have a Lease of it, he is no good Witness: so neither is this man. But by the Opinions of the three other Judges he was allowed, because the Suit here is between the King and the Patentee. (56.)

Worthy & Liddall.

Saunders moved for a Prohibition to the Spiritual Court, in a Suit there, for calling the Plaintiff Whore. Twissden, Opinions have been pro and con upon this point. The Spiritual Court has a Jurisdiction in Cases of Whoredom and Adultery; but if Suits there were allowed for such railing words, they would have work enough from Billingsgate. Saunders relied upon this, that they were only words of heat. Keel. They are Judges of that. Saunders. In Mich. 11 Jac. Rot. 664. Cryer *versus* Glover. in Com. B. The suggestion was, that she struck him, and he said, thou art a Whore, and I was never struck by a Whores hand before: there a Prohibition was granted, and I conceive the reason was, because there was a provocation; so in our case, it appears, (57.)
1 Sid. 433.

pears, that they were Scolding. According 15 Jac. Rot. 325. Short *versus* Cole, & 15 Car. 2. between Loveland and Goose. The Court refused to grant a Prohibition.

Maddox.

(58.)
2 Keb. 578.

1 Sid. 432.

Pol. 90.

WAllop moved for a Prohibition to the Spiritual Court for one Maddox, Incumbent of a Donative within the Diocese of Peterborough, who was cited into the Spiritual Court for marrying there without a Licence; and cited Fairechild's Case, Yelv. 60. But per Keeling, Moreton & Rainsford, the Prohibition was denied. Twiſden doubted; but said, if they might punish him in the Ecclesiastical Court pro reformatione morum, at least they could not deprive him.

Doctor Poordage.

(59.)

BArtue moved for a Writ of Privilege for him, he being a practising Physician in Town, and chosen Constable in a Parish. The Court said, if the Office go by Houses, he must make a Deputy. But upon consideration the Motion was refused; and a difference made between an Attorney or Barrister at Law, and a Physician: the former enjoy their Privilege, because of their attendance in publick Courts, and not upon the account of any private business in their Chambers; and a Physician's Calling is a private Calling. Wherefore they would not introduce new Privileges.

Sir John Kirle *versus* Osgood.

(60.)

An Action for words, viz. Sir John Kirle is a forsworn Justice, and not fit to be a Justice of Peace, to sit upon the Bench; and so I will tell him to his face. Moved in arrest of Judgment, because to say a man is forsworn, is not actionable, for it may be understood of swearing in common use.

discourse. Jones. They are Actionable, because applied to his Office. Stukely's Case. 4 Co. & Fleetwood's Case in Hob. 267. Though a man's Office is not named, yet if the words do refer in themselves, or are applied to it, they are Actionable: so in our case. Winnington. They are not Actionable, for they admit of a construction in mitiori sensu: In Stukely's case that has been cited, corruption in his Office is necessarily implied, but not in this case. Rolls 56. Keeling. He calls him in effect a corrupt Justice; and that supplies the communication concerning his Office: words must be construed according to common acceptation. Moreton. I see little difference between this and Sir John Ifam's case. 1 Cro. 14. & Sir William Massam's case. Rainsford accorded. He cited 1 Rolls 53. & 4 Co. Stukely's Case. Twifden was of the same Opinion: for the words tend to disgrace him in his Office. Judgment for the Plaintiff.

Hastings Attorney of the K. B.

Rolls 1. Side 410.

Winnington complained to the Court on his behalf, that he being an Attorney of this Court, was not suffered to appear for his Client in the Court at Stepney. That Court, he said, was erected by Letters Patents within these two years; and the Attornies of this Court, being an ancient Court, ought not to be excluded. On the other side it was urged, that they had a certain number of Attornies appointed by their Charter, as there is at the Marshals Court. Keeling. This is a new Court, and for my part I think our Attornies cannot be excluded. Hastings may bring his Action. If a Patent erecting a new Court, may limit a certain number of Attornies that shall practise there, it may as well limit a certain number of Counsel. Coleman. They have so in the Marshalsey, and in London. Keeling. Their Courts in London are ancient, and their Customs confirmed by Acts of Parliament. The new Court of the Marshalsey is indeed a new erected Court, (for the old Court of the Barge was another thing) and as for their having a certain number of Counsel or Attornies, the question is the same with this before us, whether they can legally exclude others. I do not see how the King by a new Patent can ouste any man of his privileges. Twifden said it was

(61.)

was a new point, and that he had never heard it stit'd before. Afterwards being moved again, Keeling said, they should have their Judgments quickly, if they stood upon it.

(62.) Twisd. I have known this ruled, if you say you will refer
Supr. 20. pl. 52. the cause to such a man, that ex consequente the cause must stay, because that man is made Judge; and that the staying of the cause is implied in the reference.

Dominus Rex *versus* Vaws.

(63.) **M**oved to quash a Presentment for refusing to be sworn Constable of an Hundred, because the Presentment does not mention before whom the Sessions were held, which was quash'd accordingly; and Twisden said, the Clerk of the Peace ought to be fined for returning such a Presentment.

Birrell & Shawe.

(64.) **S**cire facias against the Bail. The Defendant pleads,
2 Keb. 517. that before the return of the Writ of Scire facias, there was a Capias ad satisfaciend. against the principal, by vertue whereof he was taken, and paid the money: but alledges no place where the payment was. Twisd. You cannot make good this fault.

Dodwell & Ux. *versus* Burford.

(65.) **T**he Plaintiffs in an Action of Battery declared, that the
Mayhem. Defendant struck the Horse whereon the Wife rode, so that the Horse ran away with her, whereby she was thrown down, and another Horse ran over her, whereby she lost the use of two of her fingers. The Jury had given them 48l. damages, and they moved the Court upon view of the maim, to increase them: whereupon the Declaration was read; but the Court thought the damages given by the Jury sufficient.

1 Leon. 139.
Sryl. 343.

Smith

Smith *versus* Bowin.

Action upon a Promise. The Plaintiff declares, that the Defendant, in consideration that the Plaintiff would suffer him to take away so much of the Plaintiffs Oaks, which the Defendant had cut down, promised to pay to him so much for it, and also to pay him six pounds which he owed him for a Debt. After a Verdict for the Plaintiff, Williams moved in Arrest of Judgment, that the Plaintiff was an Infant, and he not being bound by the agreement, that the Defendant ought not to be bound by it neither. Keeling. If an Infant let you a House, shall he not have an Action against you for the Rent? Twiss. I have known an Action upon the Case brought by an Infant upon a Promise to pay so much money, in consideration that he would permit the Defendant to enjoy such a House: It was long insisted upon, that this was not a good consideration because not reciprocal; for the Infant might avoid his Promise, if an Action were grounded upon it against him: but it was adjudged to be a good consideration, and that the Action was maintainable. And in the principal Case the Court gave Judgment for the Plaintiff, Nisi, &c. (66.)

1 Roll. 19.
pl. 4.
Hob. 77.

1 Sid. 4r.

Bear *versus* Bennett.

TWissen. When a Man is arrested, and has lain in Prison three Terms, and is discharged upon Common Bail, whether shall the Plaintiff ever hold the Defendant to special Bail afterwards for the same cause, if he begins anew? Keel. If he may, then a Man may be kept in Prison for ever at that rate. At last it was agreed, that if he would pay the Defendant his Costs for lying so long in Prison, he should have special Bail. (67.)

Mr. Masters moved for a Prohibition to the Spiritual Court, to stay a Suit there against a Man, for having married his Wives Sister's Daughter, alleging the Marriage to be out of the Levitical degrees. Cur. Take a Prohibition and demur to it, for it is a Case of Poment. (68.)

2 Keb. 551.
32 H. 8. c. 38.
Co. Lit. 235. a.
3 Cro. 228.
Hob. 181.
Moor 907.
1 Roll. 832.

Dominus

Dominus Rex *versus* Turnith.

(69.)

Moved to quash an Indictment upon 5 Eliz. cap. 2. for exercising a Trade in Chestnut in Hertfordshire, not having been an Apprentice to it for seven years: because the Statute says, they shall proceed at the Quarter-Sessions, and the word Quarter is not in the Indictment. Twisden. That word ought to be in. And I believe the using of a Trade in a Country Village, as this is, is not within the Statute. Moreton accords. Rainsford. It will be very prejudicial to Corporations not to extend the Statute to Villages. Twisden. I have heard all the Judges say, that they will never extend that Statute further than they needs must. Obj. further, That there wanted these words, sc. Ad tunc & ibidem onerati & jurati, for which all the three Judges, Keeling being absent, conceived it ought to be quash'd.

(70.)

1 Cro. 68.

A Cause was removed out of London by Habeas Corpus, wherein the Plaintiff had declared against the Defendant as a feme sole Merchant; and Bartue moved for a Procedendo, because (he said) they could not declare against her here as a feme sole, for that she had a Husband. Jones contra. The Husband may then be joyned with her, for he is not beyond Sea. Twisden. I think a Procedendo must be granted for the cause alledged. It was resolved in Langlin and Brewin's Case in Cro. (though not Reported by him) That if the Wife use the same Trade that her Husband does, she is not within the Custom. And they are to determine the matter there, whether this Case be within their Custom: perhaps a Disquallet (as this Trade is) is not such a Trade as their Custom will warrant: and whether it will warrant it or not, is in their Judgment. A Procedendo was granted.

Tomlin *versus* Fuller.

A Special Action on the Case was brought for keeping a Passage stopp'd up, so that the Plaintiff could not come to cleanse his Gutter. After Verdict for the Plaintiff, it was mov'd in Arrest of Judgment, that there ought to have been a request for the opening of it. Answ. It is true, where the Balance is not by the Party himself, there must be notice before the Action brought: but in this Case, the wrong began in the Defendant's own time. Twisden. I know this hath been ruled: where a Man made a Lease of a House with free liberty of ingress, &c. through part of the Lessors House, the Lessor notwithstanding might shut up his dooys, and was not bound to leave them open for his coming in at one or two of the Clock at Night, but he must keep good Hours. And must the Defendant in this Case keep his Gate always open expecting him? wherefore it seems he ought to have laid a Request. Cur. It's aided by the Verdict. Twisden. It is not good at the Common Law; and the Defendant might well have demurred for that cause. Judgment pro Querente.

(71.)

5 Co. 101. 2.

1 Cr. 395, 396.
2 Cr. 652, 5. 23.

Butler & Play.

Upon a Motion for a new Trial in a cause, where the matter was upon protesting a Bill of Exchange; Serjeant Maynard said the Protest must be on the day that the Money becomes due. Twisden. It hath been ruled, That if a Bill be denied to be paid, it must be protested in a reasonable time, and that's within a Fortnight: but the Debt is not lost by not doing it on the day. A new Trial was denied.

(72.)

Hughes & Underwood.

(73.)
Superfedeas.

Yelv. 6.

Apres 195.

Keeling. The very Sealing of the Writ of Error is a Superfedeas to the Execution. Twissd. There was once a Writ of Error to remove the Record of a Judgment between such and such: but some of the Parties Names were left out: and by my Brother Wyld's advice, that Writ not removing the Record, they took out Execution. But the Court was of Opinion, that, though the Record was not removed thereby (of which yet, they said, he was not Judge, whether it was, or not) yet, that it so bound up the cause, that they could not take out Execution. It is indeed good cause to quash the Writ of Error, when it comes up; but Execution cannot be taken out.

Term. Hill. 21 & 22 Car. II. 1669. in B. R.

Jefferson & Dawson.

In a Scire Fac. upon a Recognizance in Chancery entred into by one Garraway, There was a Demurrer to part, and Issue upon part. And the Question was, Whether this Court could give Judgment upon the Demurrer? (74.)
 Jones. The Judgment upon the Demurrer must be given in Chancery. The Court of Chancery cannot try an Issue, and therefore it is sent hither to be tryed: but with the Demurrer this Court has nothing to do. Indeed the Books differ in case of an Issue sent hither out of Chancery, whether the Judgment shall be here or there: Keilway says, it ought to be given here. My Lord Coke in his 4 Inst. says, it must be given in Chancery. But none ever made it a Question, whether Judgment upon a Demurrer were to be given here or there? 5 Co. Jurisdiction of Courts, f. 80. Saunders contra. When there is a Demurrer upon part, and Issue upon part, the Record being here, this Court ought to give Judgment, because there can be but one Execution. Keeling. If the Record come hither intirely we cannot send it back again: I cannot find one Authority that the Record shall be removed from hence. He cited Keilway 941. 21 H. 7. Co. 2. 12. Co. 2 Gro. 12. Entries, 678. 24 Edw. 3. f. 65. there it is held, that Judgment shall be given here upon a Demurrer. Now if it must not be given here, there must be two Executions for the same thing, or else they must lose half, for they can have but one Elegit. At another day the Judges gave their Opinions severally, that Judgment ought to be given in this Court upon the whole Record: for that it is an intire Record, and the Execution one; and if Judgment were to be given there upon the Demurrer, there must be two Executions. And because the Record shall not be remanded. Twisden said, the Record it self was here: and that it had been so adjudged in King and Holland's Case, and in Dawkes and Batter's Case: though

though my Lord Chief Baron, being then at the Bar, urged strongly, that it was but the tenour of the Record that was sent hither. And it is a Maxim in law, That if a Record be here once, it never goes out again: for that here it is coram ipso Rege: So that if we do not give Judgment here, there will be a failure of Justice, because we cannot send the Record back. The Jury that tries the Issue must assess the Damages upon the Demurrer. The Record must not be split in this Case. Accordingly Judgment was given here.

Willbraham & Snow.

(75.)
2 Keo. 588.
1 Sid. 438.
2 Sand. 47.
345.

Moor 757.

TROVER and Conversion. Upon Issue Not-Guilty, the Jury find a special Verdict, viz. that one Talbot recovered in an Action of Debt against one Wimb, and had a Fieri Facias directed to the Sheriff of Chester, whereupon he took the Goods into his possession, and that being in his possession, the Defendant took them away, and converted them, &c. and the sole Point was, whether the possession which the Sheriff has of Goods by him levied upon an Execution, is sufficient to enable him to bring an Action of Trover? Winnington. I conceive the Action does not lie. An Action of Trover and Conversion is an Action in the right, and two things are to be proved in it, viz. a Property in the Plaintiff, and a Conversion in the Defendant. I confess that in some Cases, though the Plaintiff have not the absolute Property of the Goods, yet as to the Defendants being a wrong-doer, he may have a sufficient Property to maintain the Action against him. But I hold, that in this Case the Property is not at all altered by the seizure of the Goods upon a Fieri facias, (for that he cited Dyer, 98, 99. and Yelvert. 44.) This Case is something like that of Commissioners of Bankrupts: they have power to sell, and grant and assign: but they cannot bring an Action: their Assignees must bring all Actions. It is true, a Sheriff in this Case may bring an Action of Trespass, because he has possession: but Trover is grounded upon the right, and there must be a Property in the Plaintiff to support that: whereas the Sheriff takes the Goods by virtue of a nude Authority: As when a Man deviseeth, that his Executors shall sell his Land, they have but a nude Authority. Cur. The Sheriff

Sheriff may well have an Action of Trover in this Case. As for the Case in Yelvert. 44. there the Sheriff seized upon a Fieri fac. then his Office determined: then he sold the Goods, and the Defendant brought Trover. And it was holden, that the Property was in the Defendant by reason of the determining of the Sheriffs Office: and because a new Fieri facias must be taken out, for that a venditioni exponas cannot issue to the new Sheriff. They compared this Case to that of a Carrier; who is accountable for the Goods that he receives, and may have Trover or Trespass at his Election. Twisden said, the Commissioners of Bankrupts might have an Action of Trover, if they did actually seize any Goods of the Bankrupts, as they might by Law. Rainsford said, let the Property, after the seizure of Goods upon an Execution, remain in the Defendant, or be transferred to the Plaintiff, since the Sheriff is answerable for them, and comes to the possession of them by the Law, it is reasonable that he should have as ample remedy to recover damages for the taking of them from him, as a Carrier has, that comes to the possession of Goods by the delivery of the Party. Moreton said, if Goods are taken into the custody of a Sheriff, and the Defendant afterward become Bankrupt, the Statute of Bankrupts shall not reach them: which proves the Property not to be in the Defendant. Twisd. I know it hath been urged several times at the Assizes, that a Sheriff ought to have Trespass and not Trover, and Counsel have pressed hard for a special Verdict. Moreton. My Lord Chief Justice Brampton said, he would never deny a special Verdict while he lived, if Counsel did desire it.

Moor 745.

2 Cro. 73.

1 Roll. 491.

Gavel & Perked.

Action for words, Viz. You are a Pimp and a Bawd, and fetch young Gentlemen to young Gentlemen. Upon Issue Not-Guilty, there was a special Verdict found. Jones. The Declaration says further, whereby her Husband did conceive an evil Opinion of her, and refused to cohabit with her. But the Jury not having found any such special damage, the Question is, whether the words in themselves are actionable, without any relation had to the damage alledged. I confess that

(76.)

2 Keb. 589.

1 Sid. 241.

1 Ro. 44. pl.9.
1 Cro. 229.

that to call one Bawd is not actionable: for that is a term of reproach used in Scolding, and does not imply any act whereof the Temporal Courts take notice: for one may be said to be a Bawd to her self. But where one is said to be a Bawd in such actions as these, it is actionable: 27 H. 8.

1 Cro. 261.

14. If one say, that another holds Bawdry, it is actionable: 1 Cro. 329. Thou keepest a Whore in thy House to pull out my Throat: these words have been adjudged to be actionable: for that they express an act done; and so are special, and not general railing words. In Dimock's Case, 1 Cro. 393. Two Justices were of Opinion, that the word Pimp was actionable of it self. But I do not rely upon that, or the word Bawd; but taking the words all together, they explain one another: the latter words show the meaning of the former; viz. that her Pimping and Bawdry consisted in bringing young Men and Women together, and what she brought them together for, is sufficiently expressed in the words Pimp and Bawd; viz. that she brought them together to be naught. And that is such a Slander, as if it be true, she may be indicted for it, and is punishable at the Common Law. The Court was of the same Opinion: and gave Judgment for the Plaintiff. Nisi, &c.

Healy & Warde.

(77).
Jurisdiction

Error of a Judgment in Hull. Weston. The Action brought upon a Promise, cum inde requisitus foret: and does not lay, cum inde requisitus foret infra Jurisdictionem. Twisd. Though the agreement be general, cum inde requisitus foret, yet if he does request within the Jurisdiction, it is good enough; and so it has been ruled: and this Error was disallowed.

Boswill & Coats,

TWO several Legacies are given by Will to Alice Coats (78.) and John Coats; the Executors depolite these Legacies in a third persons hand for them: and take a Bond of that third person, conditioned, That if the Obligor at the request of shall bring in *Alice and John Coats*, when they shall come to their Ages of Twenty one years, to give such a Release to the Executors of *Francis Gibs*, as they shall require, then, &c. one of the Legatees comes of Age, and during the minority of the other, the Bond is put in Suit; and this whole matter is disclosed in the Pleading: And the Question was, whether the Defendant was obliged to bring him in, to give a Release, that was of age before the Action brought, or might stay till both were of age, before he procured a Release from either? The Court was of Opinion, that it must be taken respectively, and because it appears that the Legacies were several, that several Releases ought to be given, upon the reason of Justice Wyndham's Case, 5 Co. And ^{2 Cro. 295.} Twisden said, if there were no more in it, than this, sc. when ^{1 Sand. 184.} they shall come to their Ages of, &c. it were enough to have the Condition understood respectively; for they cannot come to their ages at one and the same time. And Judgment was given accordingly.

Twisden. If an Executor plead several Judgments, you (79.) may reply to every one of them, obtent. per fraudem; or you may plead separalia Judicia, &c. obtent. per fraudem: But in pleading separalia Judicia obtent. per fraudem, if one be found to be a true debt, you are gone.

Keeling & Twisden. Notwithstanding the Statute of 23 (80.) H.6. which obliges the Sheriff to take Bail, yet he can make no other Return of a Capias, than either Cepi Corpus, or non est inventus: for at the Common Law he could return nothing else, and the Statute, though it compels him to take Bail, does not alter the Return: and so in a Case between Franklin and Andrews, it has been adjudged here. ^{2 Keb. 591.} ^{Post. 57. pl. 1.}

Crofton

(81.)
2 Keb. 595.
1 Sid. 439.

7 Co. 36.
11 Co. 88.
1 Rol. 106.
pl. 16, 17.

2 Inst. 163.
10 Co. 75.
2 Cro. 577.

Offley moved for a Certiorari to the Justices of Peace for Middlesex, to remove an Indictment against one Crofton upon the late Statute made against Non conformist Ministers, coming within five miles of a Corporation: The Indictment was traversed. He urged, that by the Statute, no Indictment will lie for such Offence: For where an Act of Parliament enacts, that the Penalty shall be recovered by Bill, Plaint, or Information, (as the Statute upon which this Indictment is grounded, does) there an Indictment will not lie: 2 Cro. 643. Twisd. If the Statute appoint that the penalty shall be recovered by Bill, Plaint, &c. and not otherwise, there (I confess) an Indictment will not lie: but without negative words I conceive it will, though the Statute be Introductive of a new Law, and create an Offence, which was none at the Common Law. For whenever a thing is prohibited by a Statute, if it be a publick concern, an Indictment lies upon it: and the giving other remedies, as by Bill, Plaint, &c. in affirmative words, shall not take away the general way of proceeding which the Law appoints for all Offences. Keeling differed in Opinion, and thought, that where a Statute created a new Offence, and appointed other remedies, there could be no proceeding by way of Indictment. Afterward Offley moved it again, and cited 2 Cro. 643. 3 Cro. 544. Mag. Chart. 201 & 228. Upon the second motion. Keeling came over to Twisdens Opinion. But it was objected, That upon an Indictment the Poor of the Parish would lose their part of the penalty: To which Twisdens said, that he knew it to have been adjudged otherwise at Serjeants Inn, and that where a Statute appoints the Penalty to be divided into three parts, one to the Informer, another to the King. and the third to the Poor, that in such case, where there is no Informer, as upon an Indictment, there the King shall have two parts, and the Poor a third.

The

The King *versus* Baker.

AN Indictment in Hull for saying these words, viz. That (82.)
whenever a Burgeſs of *Hull* comes to put on his Gown,
Sathan enter into him. Levins moved, that these words
would not bear an Indictment. Keeling. The words are a
Scandal to Government. Levins. The Indictment con-
cludes, in malum exemplum inhabitantium, whereas it should
be, quamplurimorum subditorum Domini Regis in tali casu
delinquentium. And for this adjudged naught.

Twifden. If the Defendant in an Action of Debt for Rent (83.)
plead nil debet, he may give in Evidence a suspension of the
Rent. Infra 118.
pl. 18.

A Parson Libels in the Spiritual Court against several of (84.)
his Parishioners for *Cythe-Curse*. They pray a Prohibition. 2 E. 6. c. 13.
2 Keb. 596.
Yelv. 128, 129.
Keeling. *Curse*, *Gabel* and *Chalke*, are part of the *Free-*
hold, and not *Cythable*. They granted one Prohibition to
all the Libels, but ordered the Plaintiffs to declare sever-
rally.

Maleverer *versus* Redshaw.

DEbt upon a Bond of 40 l. the Condition was, for ap- (85.)
pearing at a certain day, and concluded, if the party 2 Sand. 78.
1 Sid. 456.
appeared, then the Condition to be void. The Defendant
pleaded the Statute of 23 H. 6. Coleman. The Bond is void
by the exprels words of the Statute, being taken in other form
than the Statute prescribes. Keeling. If the Condition of a
Bond be, That if the Obligor pay so much money, then the
Condition to be void, in that case the Bond is absolute.
Twifden. I have heard my Lord Hobart say upon this occa- Hob. 14.
sion, that because the Statute would make sure work, and
not leave it to Exposition what Bonds should be taken, there-
fore it was added, that Bonds taken in any other form should
be void. For, said he, the Statute is like a Tyrant, where
he comes, he makes all void: but the Common Law is like

a Nursing Father, makes void only that part where the fault is, and preserves the rest. Keeling. If the Condition had been, that the party should appear, and had gone no further, it would then have been well enough. Twissd. Then why may not that which follows be rejected, as idle, and surplusage? Cur. Adviseare vult.

Jones *versus* Tresilian.

(86.)
2 Keb. 597.

2 Roll. 548.
pl. 2. 549. pl. 9.

An Action of Trespas of Assault and Battery. Defendant pleads, de son assault demesne. The Plaintiff replies, That the Defendant would have forced his Horse from him, whereby he did molliter insultum facere upon the Defendant, in defence of his possession. To this the Defendant demurred. Moreton. Molliter insultum facere is a contradiction. Suppose you had said, that molliter you struck him down. Twissden. You cannot justify the beating of a man in defence of your possession, but you may say that you did molliter manus imponere, &c. Keeling. You ought to have replied, that you did molliter manus imponere, quæ est eadem transgressio. Cur. Quer' nil capiat per billam, unless better cause be shewn this Term.

Rich & Morris.

(87.)
Arbitre-
ment.

In an Action of Debt for not performing an Award. The Plaintiff declares, that inter alia Arbitratum fuit, &c. Twissd. That is naught.

--- & Crisp *versus* the Mayor of Berwick.

(88.)

An Action of Covenant is brought against the Mayor, Burgesles and Corporation of Berwick, upon an Indenture of Demise; wherein the Plaintiffs declare, that the Defendants did demise to them a House in Berwick, with a Covenant, That the Plaintiffs should enjoy the same without interruption

terruption by them, or any other person or persons whatso-
 ever: and alledge, that a Stranger claiming a Title, did
 make an Entry upon them, and kept them out of possession.
 To this the Defendants plead a local Plea: to wit, that the
 said Stranger did not enter upon the Plaintiffs, &c. upon
 which Issue is joyned. Then do the Plaintiffs make a sug-
 gestion, and pray a Venire facias into the next County. Upon
 which there is a Trial. Jones conceived this to be a mis-trial,
 and that the Venire ought to have been de vicineto of the
 Castle of York, where the Covenant is alledged to have been
 made: first, this fault is not aided by any of the Statutes
 of Jeoffayles: not by the last and greatest of all. That aids Post. 199.
 where the Venire facias is awarded from another place than it 1 Sand. 247.
 ought to be, but not when awarded from another County;
 which is my Exception. That at the Common Law this Ve-
 nire facias is not well awarded, I telle upon Dowdale's Case 6 Co. 46.
 6 Rep. if an Action be brought upon a matter done out of
 the Kingdom, the Trial shall be where the Action is laid. In
 our case the Action is grounded upon an Indenture, supposed
 to be made within the County of York: but Issue is joyned
 upon a matter done out of the Kingdom; for so Berwick is.
 This Issue, I conceive, ought to be tryed where the Action
 is laid. It is true in the case of Wales the Law is other-
 wise: for I find, that Wales is parcel of the Realm of Eng-
 land, though the Kings Writs do not run there. But Ber-
 wick is part of the Realm of Scotland, and was conquered
 by King Edw. 4. and Acts of Parliament name Berwick.
 When Calice was in possession of the Kings of England, and
 a matter arising within Calice came in Issue, was ever any
 Venire facias awarded to Dover? Twiss. There are two Pre-
 sidents of such Trials: one in 12 Eliz. Rot. 630. and in
 2 Rolls 97. I have asked my Brother Warrington who was
 a knowing man, how it came to pass that Berwick was put
 into Acts of Parliament? he said, he knew no other reason
 than that the Recorder of Berwick was at first in Parliament,
 and desired it, and therefore it hath continued ever since. Mr.
 Weston said, that 3 Cro. 465. was an Authority. In this
 case it hapned, that during the Cur. advisare vult, one of the
 Plaintiffs dyed: and the question was, what should be done?
 Twiss. There is a case in Larch, wherein this difference is ta-
 ken, viz. If there be no Continuance entred, you may enter
 the Judgment as at the day in Bank: but if Continuances
 are

are entred, then you cannot go back, but must enter the Judgment to the time of the Continuances. It was put off for Counsel to be heard in it.

Smith & Wheeler *sup.* 16. pl. 46.

(89.)

2 Inst. 216.

9 Co. 121. a.b.

In this case Serjeant Maynard was about to argue, that the residue of the Term was not forfeited to the King, Keel. Brother Maynard, you would do well to be advised, whether or no you, being of the King's Counsel, ought to argue in this case against the King? Maynard answered, that the King's Counsel would have but little to do, if they should be excluded in such cases: and that Serjeant Crew argued Haviland's case, in which there was the like question. Twissd. In Stone & Newman's case, I know the King's Counsel did argue against Estates coming to the Crown: but if my Lord think it not proper, my Brother Maynard may give his argument to some Gentleman at the Bar to deliver for him. Afterward Term. Pasch. 22 Car. 2. 1670. the case came to be argued again. Jones argued for the Plaintiff in the Writ of Error: 1. Whether this Settlement be fraudulent or no? That Fraud is not to be presumed, he cited the Chancellor of Oxford's case, 10th Rep. & 1 Cro. 549, 550. But for the second point, he held that here is a Trust forfeitable to the King. He quoted Sir John Duncomb's case, 2 Cro. That the Trust in this case is forfeited, he proved from the nature of a Trust, which is an equitable Interest, or a right of perception of the profits of an Estate; the cestuy que Trust, hath *jus habendi* & *jus disponendi*. And though he that hath a Trust, hath, in Law neither *jus in re*, nor *jus ad rem*, yet in Equity he hath both: In Equity whatever I have a right to dispose of, I have a right to take the profits of. For if a man makes a Conveyance to the use of one and his heirs, in Trust that he shall convey over, though it is not express that he shall take the profits, yet he shall take them. Now in the second Proviso there is a double expression, one that amounts to a Revocation, the other amounting to a disposition, or limitation. Now he that hath a power of disposition, hath a right that may be forfeited. And therefore the Duke of Norfolk's case comes not to this, for we are not in the power of Revocation:

tion: I decline that, but we are in a power of disposition. Now this is good by way of Trust: in Law indeed such a Proviso is naught, but in a Trust the intention of the parties carries it: I observe in forfeitures at the Common Law, where a man hath only *jus disponendi*, though he hath no Estate, yet he may forfeit it: *Plow. Com. 260*. A man is possessor of a term in the right of his wife, though he hath no Estate himself, yet he may forfeit it: and the reason is, because he, hath *jus disponendi*. If a man might by such a disposition as this protect his Estate from being forfeited, little Land would come to the Crown upon Attainders. There are two badges of Ownership: the one is a perception of the profits, the other a power of disposing: both which are in our case: and a favourable construction ought not to be but upon a Deed for encouragement of Craftors. *Winnington contra*. As for the first point, the fraud ought to be found: and this Lease was made long before the Attainder, or the Treason committed. For the second point, the question will be, what our Law calls a Trust? Then I shall examine whether there was such a thing in Mayn at the time of his decease: A Trust I find to be a confidence reposed in the person, that another shall take the profits, and that the Trustee shall Convey according to his directions: this I gather from these books, viz. *Plowd. 352*. *Delamere's case. 1 Rep. 121, 122*. *Co. Lit. 272*. Now if these two qualities, or either, shall fail in this case, then Simon Mayn had no Trust to forfeit: For that, the case will depend upon the true stating the words of the Deed. For the first Proviso, it doth not cohere with any of these qualities: for by virtue of that Proviso he could not be said to have any Right: he hath no *jus disponendi*, but upon Contingencies. If he have no Children, he hath no such power; nay, if he have Children, they must be living at his death. Further, by these Provisoes, if the Contingencies do happen, he hath but a power to declare the Uses; he hath no Interest in him at all: *Litt. Sect. 463*. It is one thing to have a power or possibility of limiting an Interest, another to have an Interest vested: *7 Rep. 11*. & *Moor's Reports 366*. about the delivery of a Ring; where they hold, that if it had been to have been done with his own hand, it had not been forfeited. The case of Sir Ed. Clere is different from ours: for if a man make a feoffment to the use of his last Will, or to the use of such persons as shall be appointed by his last

7 Co. 13. 2.

last Will; in this case he remains a perfect owner of the Land. But if a man makes a Conveyance reserving a power to make Leases, or to make an Estate to pay Debts, he hath here no Interest, but a naked power. The Duke of Norfolk's Case is full in the point: A Conveyance to the use of himself for life, the Remainder to his Son in Tail, with power to reboke under Hand and Seal: adjudged not forfeited; and yet he had a power to declare his mind as in our case. Paget's Case, Moor 193, 194. Keeling. If this way be taken, a man may commit Treason pretty cheaply. Twiss. Whoever hath a power of Revocation, hath a power of Limitation. The reason is, because else the Feoffees would be seized to their own Use. Sir William Shelly's Case in Latch. Twissden. There is no difference betwixt the Duke of Norfolk's Case and this; only here it is under his hand writing, and there under his proper hand writing.

Afterward Term. Pasch. 23 Car. 2. 1671. the Court delivered their Opinions (Hales being then Chief Justice.) Moreton. I conceive the Judgment in the Common-Pleas is well given: As for the first point, whether this Conveyance made by Sir Simon Mayn be fraudulent or not, the Counsel themselves have declined it; and therefore I shall say nothing to it: For the second, I conceive no larger Interest is forfeited than during the Life of the Father. If it be objected, that the Father had by this Proviso *jus disponendi*; I answer, it is true, he had a power, if he had been minded so to do, but it was not his mind and Will: *Now animus hominis est ipse homo*; but he must not only be minded so to do, but he must declare his pleasure. Hobart saith, if a man will create a power to himself, and impose a Condition or Qualification for the Execution of it, it must be observed. Now here is a personal and individual power, seated in the heart of a man. And it seems to me a stronger Case than that of the Duke of Norfolk, put in Englefield's Case, where yet the Condition was not given to the King by the Statute of H. 8. There was a later Case adjudged in Latch, between Warner and Hynde; a Case that walked through all the Courts in Westminster-Hall; there by reason of the *ipso declarante*, it could not be forfeited. Rainsford. I hold it is not forfeited. My reason is, because the Proviso is at an end and determined; for when he dyed and made no Will, there's an end of the Proviso.

Proviso. The altering of the old Trust is to be done by Sir Simon Mayn, and it is inseparable from his person : nothing can be more inseparable than a mans Will. Moor 193. Twisd. I am of the same Opinion. Hales was of the same Opinion ; that nothing was forfeited but during Sir Simon's life. The Proviso, he said, did not create a Trust, but potestatem disponendi, which is not a Trust. He said he did not understand the difference between the Duke of Norfolk's case and this. Accordingly the Judgment was affirm'd.

In a cause wherein one Aston was Attorney, Keeling said, (90.)
That a man may discontinue his Action here before an Action Suits.
brought in the Common-Pleas : But if he do begin there, and then they plead another Action depending here, and then they discontinue, I take it the Attorney ought to be committed for this practice. Twisden. When I was at the Bar, Error was brought, and Infancy assigned, when the man was thirty years old : and the Attorney was threatned to be turned out of the Roll.

Serjeant Newdigate moved for a Certiorari to remove an (91.)
Indiament hither from Bedford, against several Frenchmen Certiorari.
for Robbery. Keeling. Will it remove the Recognisances there to appear ? Twisden. I never knew such a motion made by any but the King's Attorney or Solicitor. Rainsford. There is no Indiament yet before a Judge of Assise. Keeling. You may have a Certiorari ; but it must not be delivered till the Indiament be found ; and then the Judge hath the Prosecutors there, and may bind them over hither, and so the Trial may be here.

Keel. A Jury was never ordered to a view before their appearance, unless in an Assise. (92.)
Twisd. Neither shall you have View.
it here but by consent.

Nosworthy *versus* Wyldeman.

(93.)
2 Keb. 615.

2 Cro. 690.

1 Rol. 111.
pl. 4.

The Plaintiff declares in an Indeb. Assumpsit, that the Defendant was indebted to him in 50 l. for so much money received of the Plaintiff by one Thomas Buckner, by the appointment and to the use of the Defendant. After a Verdict for the Plaintiff, it was moved in Arrest of Judgment, that the Plaintiff could not have an Action for money received by the Defendant to the use of the Defendant. But because it might be money lent, which the Defendant received to his own use, though he was to make good the value to the Plaintiff, the Court will presume after a Verdict, that it appeared so to the Jury at the Trial. For where a Declaration will bear two constructions, and one will make it good, and the other bad, the Court after a Verdict will take it in the better sense. And accordingly the Plaintiff had Judgment.

Willams *versus* Lee.

(94.)
Account.

An Action of Account. It was prayed that the Court would give further day for giving the Account; the matter being referred to Auditors. Twisden. The Auditors themselves must give further day. Keeling. The Auditors are Judges whether there be a voluntary delay or not. If they find the parties remiss and negligent, they must certify to the Court, that they will not account.

Roberts & Mariott.

(95.)
2 Keb. 618.

Moved to discontinue an Action of Debt upon a Bond. Keeling. We will not favour Conditions. Rule, that the other side should shew cause why they should not discontinue.

Buckly

Buckley *versus* Turner.

Action upon the Case upon a Promise. The Case was, (96.)
 that Edward Turner Brother to the Defendant, was Sid. 446.
 indebted to the Plaintiff for a Quarters Rent, and the De-
 fendant, in consideration that the Plaintiff mitteret prosequi
 prædictum Edwardum Turner, (so the words are in the De-
 claration) promised to pay the money. After a Verdict for the
 Plaintiff, it was moved in Arrest of Judgment, that here is
 not any consideration; for there is no loss to the Plaintiff
 in sending to prosecute, &c. nor any benefit, but a disadvan-
 tage to the party that owed the money: besides, there is an
 uncertainty whither, or to whom he should send. Twisd. Mit-
 tere prosequi is well enough; for the Plaintiff must be at
 charge in it. Keeling. Certainly it ought to have been omit-
 teret; and if it be so in the Office-book, we will mend it.
 Twisden. This being after a Verdict, if you mend it, they
 must have a new Trial; for then it becomes another promise.
 Jones moved for Judgment, and said, he found the word mitto
 did signifie to send, forbear, cease or let alone; as mitte me
 quæso: I pray let me alone, in Terence. And in the Latine
 and English Dictionary it hath the sense of forbearing. Keel.
 I think the consideration not good, unless the word mitto
 will admit of that sense. If it have a propriety of sense to
 signifie forbear, in reference to things as well as persons, it
 will be well. Whereupon the Dictionary being brought, it
 was found to bear that sense. And Twisden said, if a word Hob. 191.
 will bear divers senses, the best ought to be taken after a Post. 285.
 Verdict. Court. Let the Plaintiff take his Judgment. 1 Cro. 554.

Richards & Hodges.

Debt upon a Bond. The Condition was to save a Pa- (97.)
 rish harmless from the charge of a Bastard-child. 2 Keb. 612.
 The Defendant pleaded Non damnificatus. The Plaintiff 2 Keb. 619.
 replies, that the Parish laid out three shillings for keeping the 2 Sand. 83.
 Child. The Defendant rejoyns, that he tendered the money; 1 Sid. 444.
 and the Plaintiff paid it de injuria sua propria. Whereupon
 it

it was demurred: the question being, whether this Rejoinder were a departure or no from the Bar? Saunders. It is a good Rejoinder: for in our Bar we say, that the Parish is not damnified; that is, not damnified within the intent of the Condition. If I am to save a man harmless, and he will voluntarily run himself into trouble, the Condition of my Bond is not broken. And so our Rejoinder is pursuant to our Bar, and shews that there is no such damnification as can charge us. Twisden. The Rejoinder is a departure; as in an Action of Covenant for payment of Rent if the Defendant pleads performance; and the Plaintiff reply, that the Rent is unpaid; for the Defendant to rejoin, that it was never demanded, is a departure. You should have pleaded thus, viz. that non fuit damnificat. till such a time: and that then you offered to take care of the Child, and tendered, &c. Judgment for the Plaintiff, Nisi, &c.

Co. Lit. 304.2.

Smith, Lluellyn, & al. Commission. of Sewers.

(98.)
^{2 Keb. 635.}
^{23 H. 8. c. 5.} They were brought into Court by Attachment, because they proceeded to fine a person after a Certiorari delivered. Twisden. Sir Anthony Mildmay was a Commissioner of Sewers, and for not obeying a Certiorari, was indicted of a Præmunire, and was said to get the King's Pardon. And I have known, that upon an unmannerly receipt of a Prohibition, they have been bound to the good Behaviour. Keeling. When there are Informations exhibited against you, and you are fined a 1000 l. a man, which is less than it was in King Edward the Third's time, (for then a 1000 l. was a great deal more than is now) you will find what it is to disobey the King's Writ.

Afterwards they appeared again, and Coleman said, the first Writ was only to remove Presentments; the second to remove Orders; and we have made two Returns, the one of Presentments, the other of Orders: A general Writ might have had a general Return. Keeling. Before you file the Return, let a clause of the Statute of 13 Eliz. c. 9. be read; which being done, he said, that by the Statute of 23 Henr.

Henr. 8. no Orders of the Commissioners of Sewers are binding without the Royal Assent; now this Statute makes them binding without it, and enacts, that they shall not be Revers'd but by other Commissioners. Yet it never was doubted, but that this Court might question the Legality of their Orders notwithstanding. And you cannot oust the Jurisdiction of this Court, without particular words in Acts of Parliament. There is no Jurisdiction that is uncontrollable by this Court. Sir Henry Hungate's case was a famous case, and we know what was done in it. Moreton. Since the making this Statute of Eliz. were those Cases in my Lord Coke's Reports adjudged, concerning Chester Mills. If Commissioners exceed their Jurisdiction, where are such matters to be reformed but in this Court? If any Court in England of an inferior Jurisdiction exceed their bounds, we can grant a Prohibition. Twissd. I have known it ruled in 23 Car. 1. That the Statute of 13 Eliz. cap. 9. where it is said, there shall be no Superfedeas, &c. hath no reference to this Court, but only to the Chancery. But this is a Certiorari, whereby the King doth command the Cause to be removed, & voluit, that it be determined here, and no where else. So the Court fined them for not obeying two Certioraries, but finding them that brought them 5 l. apiece.

11 Co. 64, 65.

Jones moved, That one who was Partner with his Brother a Bankrupt, being arrested, might be ordered to put in Bail for the Bankrupt as well as for himself. Twissden. If there are two Partners, and one breaks, you shall not charge the other with the whole, because it is *ex maleficio*: But if there are two Partners, and one of them dye, the Survivor shall be charged for the whole. In this case you have admitted him no Partner by Swearing him before the Commissioners of Bankrupts. So not granted.

(99.)
Bankrupts.
13 Eliz. 7. Exp.
23. N. 5.

Rawlin's Case.

(100.)
21 Jac. 26. S. 2.
N. 1.
3 Cro. 531.

Moved by Sergeant Scroggs, That Rawlins having personated one Spicer in acknowledging a Judgment, that therefore the Judgment might be set aside. Twisden. The Statute that makes it Felony, does not provide that the Judgment shall be vacated. One Tymberly escaped with his life very narrowly: for he had personated another in giving Bail: but the Bail was not filed. Then he moved, that the Defendant had paid the Fees of the Execution, which the Plaintiff ought to have done. So the Court granted an Attachment against the Bayliff.

Taylor & Wells.

(101.)
1 Sid. 445.
Post. 289.

TROVER & Conversion, decem parium regularum & valorum, Anglice of ten pair of Curtains and Gálons. **Obj.** That it is not certain what is meant by a pair, whether so many two's, or so many Sets: and that in Web & Washburn's case, 1652. four pair of Hangings held not good Twisden. I remember that a pair of Hangings has been held naught. Trover & Convers. pro decem Ovibus & Agnis, not expressing how many Ewes and how many Lambs, ruled naught. Another Action of Trover de velis, not saying how many, held to be naught. It was urged, that ten pair of Curtains and Gálons is certain enough: for by pair shall be understood two, and so there are Twenty in all. If it be objected, that it does not appear how many of each, I answer the words ten pair, shall go to both. Besides, it is after a Verdict, and therefore ought to be made good, if by any reasonable construction it may. If it had been ten Sets, or ten Suits, then without question it had been well enough: now why may not a pair be understood of Sets or Suits, or so many as will serve for a bed, if it shall not be taken for a couple? They quoted some cases in which it had been adjudged, that in Trover and Conversion for several things, though it did not appear how many of each sort there were, yet it had been held good. Twisden acknowledged that there
had

had been such Resolutions, but said, he knew not what to think of such cases, considering the uncertainty of the Declarations. And the word pair in our case, is as uncertain as may be, there a pair of Gloves, a pair of Cards, a pair of Tongs. The word applyed to some things, signifies more, to others less, and what shall it signifie here? But by these Judges against Twisden, the Plaintiff had Judgment.

Fox & alii Exec^r of Pinlent versus Tremain.

The Plaintiffs being Executors, and some of them under age, all appeared by Attorney: and thereupon it was prayed, that Judgment might be stayed; for, 1. An Infant cannot make a Warrant of Attorney: 2. An Infant appearing by Attorney, may be amerced pro falso clamore: and the reason is, because it does not appear that he is under age; but if he appear by guardian or prochein amy, he shall not be amerced, 3. The Infant may be much prejudiced. For these reasons, and because, they said, the practice had gone accordingly, Judgment was stayed. The cases cited pro & con were, 3 Cro. 424. 2 Cro. 441. 1 Roll 288. Hutton & Askew's case, A Scire facias brought by two Executors, reciting, that there was a third, but within age: resolved that all must joyn. Colt & Sherwood's case: resolved, that an Infant Executor cannot defend by Attorney. Twisden. Where there are several Executors, and one or more under age, and the rest of full age, all must joyn in an Action, and Administration durante minore ætate, cannot be granted, if any of them be of full age: Vid. infr. 72. pl. 27.

(102.)

2 Keb. 625.
2 Sand. 212,
213.
1 Sid. 449.
Raym. 198.
Ventr. 102.
Post. 72, 296.

2 Sand. 212.

2 Roll. 207. b. 1

Yelvert. 130.
Post. 296.

Haspurt & Wills.

A Special Action brought upon the Custom of Wharfage and Cranage in the City of Norwich: The Declaration sets forth, that they have a common Wharf, and a Crane to it; and then they set forth a Custom, that all Goods brought down the River, and passing by, shall pay such a Duty. Obj. That the Custom is not good, for that it is Toll.

(103.)

² Roll. 522. b. 1
Post. 231, 132.

¹ Rol. 547. o. 2.

Post. 104, 105.

Toll-thorough ; which is malum Tolnetum. Twissd. There is a case in Hob. 175. of a bad Custom of paying the Charges of a Funeral, though the Plaintiff were a Stranger, and not buried in the Parish. So here, if they had unladed at the Key, they should have paid the whole Duty : nay, if they had unladed at any other place in the City, there would have been some reason for it : or if the Declaration had set forth, that they had cleaned the River. At Gravesend they claimed a Toll of Boats lying in the River of Thames ; and it was adjudged in Parliament to be malum Tolnetum. To stay.

Heskett & Lee.

(104.)
² Keb. 627.
² Sand. 94.
¹ Sid. 446.

A Writ of Error was brought to reverse a Judgment given in a common Recovery in the County Palatine of Lancaster. Weston. The Tenant in the common Recovery is an Infant, and appears by his Guardian : but there is a fault in the admittance, for whereas he ought to have been admitted a Defendant, in this form ; scil. A. B. admittitur per C. D. Gardianum suum ad comparendum & defendendum : he is admitted in the Record ad sequendum. The second Error is in the appearance : which is entred in this manner ; sc. qui admissus est ad sequendum, &c. (following the Error of the admittance) ut Gardianus ipsius Thomæ in propria persona sua venit & defendit, &c. so that he is admitted ad sequendum, which is the act of the Plaintiff. And as Guardian he defends ; which is the act of the Defendant : and further, it is said that the Guardian appears in propria persona, which cannot be. Now I conceive that the Assignment of the Guardian and the appearance of the Guardian, is triable by the Record : and if the Infant should bring an Action against his Guardian, he must declare that he was admitted to appear and defend his right. Now whether will this admittance ad sequendum, warrant such a Declaration ? I conceive it will not, and that therefore the Recovery is erroneous. Winnington. I am for them that claim under the Recovery. And I conceive this whole Record is not only good in substance, but according to the form used in all common Recoveries. If an Infant Tenant appear per Gardianum, either as Defendant or Vouchæ, he shall be bound, as well as one of full age. And

And if the Guardian faint-pleads or mispleads, the Infant hath an Action against him: 9 Ed. 4. 34, 35. Dyer 104. b. 2 Cro. 641. In our Case there is a Common Recovery, wherein the Tenant is an Infant, who ought to appear by his Guardian: whether the admittance of him here by his Guardian, be well entred or no, is the Question: the word *sequi* signifies only to follow the cause; and the Defendant doth prosecute and act; a Venire by Proviso may be taken out at the Defendants Suit: 35 H. 8. 7. So in a Replevin, the Defendant is the Prosecutor: and the Tenant doth sue in Common Recoveries, and is the only person that doth prosecute and act; so that I think the word is proper. It is true, one Book is cited, where *prosequendum* is void in an Ejectment: 2 Cro. 640, 641. Sympton's Case, but that Judgment is upon the point of Prochein Amy. There is a President for me in 6 Car.I. which, I believe, was the President of this Case. And Sir Francis Englefield's Case, where the Infant came in as *Couchee*, is the same with ours. As for the second Error assigned, viz. that the Guardian is said to come in *propria persona*; In the Earl of Newport's Case, and in Englefield's Case *propria persona* is in the same manner as here. Now the Law doth not regard so much the manner of the admittance, as that a good Guardian be admitted. Twisden. This is a Recovery suffered upon a Privy Seal from the King, and upon a Marriage Settlement, upon good Consideration; and therefore ought to be favoured. The word *sequatur* is as proper for the Defendant as for the Plaintiff. And for the second, the words *propria persona* are well enough, being applied to the Guardian, who does in proper person appear for the Infant. For an Infant to suffer a Common Recovery, if it were *res integra*, it would hardly be admitted. But if an Infant will reverse a Common Recovery, he ought to do it whilst he is under age, as it was adjudged here about two years ago, according to my Lord Coke's Opinion. Weston. If you stand upon that, whether an Infant having suffered a Common Recovery, may reverse it after he is come of full age? I desire to be heard to it. Cur. *advizare vult*.

Hob. 196.
1 Rol. 731. d. 1.

Co. L. 380. b.

Tildell & Walter.

(105.)
2 Keb. 628.
in 2 E. 6.c.13.

A Vicar Libelled in the Spiritual Court, for Tythe-wood, Barrel prayed a Prohibition, suggesting, that time out of mind they paid no small Tythe to the Vicar, but that small Tythes, by the Custom of the Parish, were paid to the Parson. Twisden. If the Endowment of the Vicarage be lost, small Tythes must be paid according to Prescription.

Jordan *versus* Fawcett.

(106.)
1 Sid. 449.

Error of a Judgment in the Common Pleas. An Action was brought against an Executor, who pleaded several Judgments, but for the last Judgment that he pleads, he doth not express where it was entered, nor when obtained. Coleman held it well enough upon a general Demurrer. Twissd. It is not good, for by this Plea he is tied up to plead nothing but nul tiel Record. He might, if the Judgment had been pleaded as it ought to have been, have pleaded perhaps obtent. per fraudem. And Judgment was given accordingly.

Love *versus* Wyndham & Wyndham.

(107.)
1 Sid. 450.
2 Chr. Rep. 15.
2 Keb. 637.
Infra 14.pl.14.

Upon an Issue out of Chancery, the Jury find a special Verdict, viz. That one Gilbert Thirle was seized of the Lands in Question for three Lives, and did demise the same to Nicholas Love the Father, for a Term of years, if the Cestuy que vies, or any of them should so long live, that he being so possessed made his Will, and devised them in this manner; viz. to his Wife for her Life, and after her decease to Nicholas his Son for his Life, and if Nicholas his Son should dye without Issue of his Body begotten, then he deviseth them to Barnaby the Plaintiff. Then they find that the Wife was Executrix, and that she did agree to this Devise. And whether this be a good Limitation to Barnaby or not, is the Question. Jones I conceive it is a good Limitation to Barnaby.

Barnaby. I shall enquire whether a Termor having devised to one for Life, and after his death to another for Life, may go any farther: And secondly, admitting that he may go farther, whether the Limitation in our Case, which is to begin after the death of the second, without Issue of his Body, be good or no? For the first Point, he said the reason given in Plo. Com. 519. and in 8 Co. 94. why an executory Devise of a Term is good in Law, is because the Law takes it as devised to the last Man first, and then afterwards to the first Man; without which transposition it is not good: for if it should be a Devise to the first Man first, there would be nothing left for the last but a possibility, which is not grantable over. Now then, if a Man may devise a Term after the death of another, then he may devise it after the death of two other. It is true, this cannot be in Grants, for they are founded upon Contracts, and there must be a certainty in them: according to the Rector Chedington's Case. Now if a Devise may be good after the death of one or two, it is all one if it be limited after the death of five or six. Now that a Contingency may be devised upon a Contingency, I take it, that the Authorities are clear: 14 Car. 1. Cotton and Herle: 1 Roll. 612. resolved by three Justices. Et Hill. 9 Jac. Rot. 889. 2 Cro. 469. And for the Case of Child and Bayley, reported in 2 Cro. 461. and in Roll. 613. I conceive it is not against our Case; for they held the Devise to be void, not because it was a Contingency upon a Contingency, but in respect of the remoteness of the possibility, and because the Term was wholly devised to a Man and his Assigns. So that by the express authority of the two first Cases, and by the implication of this Case, I do think that a Devise to a Man after such a manner is good, provided that it do not introduce a perpetuity: so that where there is not the inconvenience of a perpetuity, though there are many Contingencies, they are no impediment to the Devise. Therefore where a Devise is upon a Contingency that may happen upon the expiration of one or more Men's Lives, and where it is upon a Contingency that may endure for ever, there is a great difference. The reason of the Rector of Chedington's Case was, because of the uncertainty; for in case of a grant of a Term, there is a great uncertainty; but ours is in case of a Devise; which is not taken in the Law by way of remainder: 12 Aff. 5. so that I conceive a Contingency may be limited

¶ 2

upon

upon a Contingency, provided that it be not remote. The second point is, whether this Devise (thus limited) be a good Devise? Now I conceive a Limitation is as good, as if it had been to his Wife for Life, and after her death to Nicholas for Life, and after his death to Barnaby. I agree, that if these words (if Nicholas dye without Heirs of his Body) shall not be applied to the time of his death, it will be a void Devise. But the meaning is, That if at the time of his death he shall have no Issue, then, &c. Now that they must have such Construction, I prove from the words of the Will. The Limitation of the Remainder must be taken so as to quadrate with the particular Estate. As if there be a Conveyance to one for Life, and if he dye without Issue, to another, this is a good Remainder upon Condition, and the Remainder shall rest upon the determination of the particular Estate, if the Tenant for Life have no Issue when he dyeth; but if a Man Convey to one, and the Heirs of his Body, and if he dye without Issue, to another, there it must be understood of a failure of Issue at any time; because the precedent Limitation goes further than his Life. But admitting there were no precedent words to guide the intention, and that common parlance were against me, yet if there be but a possibility of a good construction, it shall be so construed; and they may very well be understood of his dying without Issue of his Body at the time of his death. In Goodyer and Clerk's Case, in this Court: Trin. 12 Car. Rot. 1048. I confess it was adjudged, that it should be understood of a failure of Issue at any time; but in our Case, if you shall not understand it of a failure of Issue at the time of his death, it cannot have any construction at all to take effect. I think there are no express Authorities against me: those that may seem to be so, I will put, and endeavour to give an answer to them: As for Child and Bayly's Case, Reports differ upon the reason of that Judgment: For Cro. says it was held to be a void Devise, because it was taken, if he dye without Issue at any time during the term: But Serjeant Rolls goes upon another reason, Rolls 613. there he says it is void, because given absolutely to the Son and his Assigns before. In Rolls first part, 611. Leventhorp and Ashly's Case, the Remainder there

there is said to be void, because when he had devised the term to A. and the Heirs Males of his Body, it shall go to the Executors of A. and the Remainder there was to begin upon his dying without Issue at any time. The Case of Sanders and Cornish will not come to ours; for there were many Limitations for Life successively to persons not in being, &c. In the Case cited 1 Report 135. of an Estate for Life limited to one, and to every Heir successively, an Estate for Life, the Limitation was naught, because it would make a perpetual Free-hold; and no body would know where the absolute Estate should vest. So he prayed Judgment for the Plaintiff. Coleman for the Defendant. I conceive this to be a void Limitation. Mr. Jones would make this a middle Case. I shall discharge him of the first Point, though he has taken pains to argue it: and I shall rest upon this, That the Limitation of a term after the death of a Man, without Issue of his Body, is void. The Case is put as a middle Case to these two; viz. If a Man possessed of a Lease for years, Devise it to J. S. for Life, the Remainder to J. N. for Life, the Remainder to J. G. for Life; these Remainders are good. But if he do devise to J. S. and the Heirs of his Body, the Remainder over; this Remainder he admits to be void; because it depends upon so remote a possibility as may never happen. Now I conceive it is the same thing to limit it to one for Life, and if he dye without Issue, then to another for Life, as to limit it to one and the Heirs of his Body, with a Remainder over. He would tie it up from the ordinary and legal Construction to issue at the time of his death. If it be to be understood of dying without Issue at any time, then Child and Bayly's Case and Cornishe's Case, are full Authorities in the Point. Vide 2 Cro. 459. Rolls, 612, 614. There Lessee for years deviseth to one for Life, and after to Wms. and his Assigns, and if he dye without Issue then living, the Remainder to J. G. This they say is good in case of a Fee-simple; but they will not allow it in case of a term for years. Now Mr. Jones would by Construction bring the words then living, into our Case. The Legal construction of the words, dying without Issue, is, if there be a failure of Issue at any time

3 Cro. 26.
1 Leon. 286.
3 Leon. 106.
2 Sand. 111.
1 Sid. 102.

to

to come. In Pell and Brown's Case, if the words then living had not been in the Will, the Case had not been so adjudged. Keeling. You go up Hill a little. Can Barnaby take so long, as there is any issue in being of Nicholas? Jones. He cannot. Keeling. Then Barnaby's Interest depends upon a Contingency that may never happen. Jones. I grant, if Nicholas hath Issue at the time of his death, that Barnaby shall never take, but if he hath none, he shall. Keeling. 1. If I Devise Lands to A. for Life, and if he dye without Issue of his Body, to B. A. shall have an Estate Tail. So in our Case, the words and limitation is the same, though, the Devisor having but a Lease for years, there cannot be an Estate Tail of it: yet he intended not that Barnaby should have any Estate as long as there were any Issue in being of Nicholas his Body. 2. Twisden. It appears to me upon the reason of the Cases that have been cited, that the Remainder to Barnaby must be void, because of the remote possibility; But then there will be a Question to whom the Remainder of the term will go, if Nicholas dye without Issue? whether to the Executors of Nicholas, or to the Executors of Doctor Love? If A. Tenant of a term, devise it to B. for Life, the Remainder to C. for Life the Remainder to D. for Life, I have heard it questioned, whether these Remainders are good or not? But it hath been held, that if all the Remainder-men are living at the time of the Devise, it is good; if all the Candles be light at once, good. But if you limit a Remainder to a person not in being, as to the first begotten Son, &c. and the like, there would be no end if such Limitations were admitted, and therefore they are void. And some Judges are of the same Opinion to this hour. If I devise a term to A. for Life; After the death of A. his Executors shall not have it, but it shall go to the Executors of the Devisor: but if it be devised to A. generally, without saying for Life, it shall go to his Executors after his death. But a Devise for Life vests in him only during his Life, and you may make a limitation over. Keeling. I take it that A. carries the whole term, when devised to him for Life: because an Estate for Life is larger than the longest term. Twisden.

As

1 Ro. 612. pl. 3.

7 Co. 23. a.
Sid. 37.

As a term for years doth admit of Remainders, so it doth of Reversions, if you will have it so; and when he deviseth to A. during his Life, A. shall have it for his Life, but the Reversion shall be to the Devisors Executors. But if he Devise it to A. for Life, and if he dye without Issue of his Body, the Remainder to B. what shall become of the Reversion then? Keeling. You start a new Point. Court. You shall have our Judgments this Term. *16. 290.*

Knowls *versus* Richardson.

Error of a Judgment in the Common-Pleas, in an Action upon the Case for obstructing a Prospect. *(108.)* Sympson the stopping of a Prospect is no Nuisance, and consequently no Action on the Case will lye for it. Aldred's Case 9th Report 9 Co. 58. is expresse, that for obstructing a Prospect, being matter of delight only, and not of necessity, an Action will not lye. Twisden. Why may not I build up a Wall that another Man may not look into my Yard? Prospects may be stoppt, so you do not darken the Light. Judgment; nisi, &c.

Twisden. A Man may be Indicted for Perjury in a Court-Baron. *(109.)* Court-Baron. *2 Roll. 257.*

Jones moved to have a Tryal at Bar for Lands in Northumberland of 50 l. per Annum. Keeling. Its a great Tryal. *(110.)* way off, and never any Jury came from thence in your time. Twisden. But I have been of Council in Causes, wherein Tryals have been granted at Bar for Lands there. We have lost Cornwall, no Juries from thence come to the Bar, and we shall lose Northumberland too. The other side to shew cause.

Keeling

(III.)
Arrest.
Hetly 19.

Keeling upon a Motion of Mr. Holt's said, I have known many Attachments for arresting a Man upon a Sunday; but still the Affidavit contained, that he might have been taken on another day. Twif. So for arresting a Man as he was going to Church, to disgrace him.

Term. Trin. 22 Car. II. 1670. in B. R.

Parker & Welby.

An Action upon the Case against a Sheriff for making a false Return. The Plaintiff sets forth, that one Wright was indebted to him in 60*l.* and did promise to pay him, and that thereupon a Writ was sued out against him directed to the Defendant, being Sheriff of Lincolnshire, who took him into his custody, and after suffered him to go at large, whither he would, and at the day of Return, he returned that he had his body ready. Jones. They have demurred to the Declaration; which I conceive to be a good Declaration. For take the case, that there went a Latitat to the Sheriff, and the Sheriff took the person upon it, and let him go at large, no body will deny, but that an Action of Escape will lie against him: and when he makes such a false Return, as here, that he has the body ready, why will not an Action lie for a false Return? and this is no new case, but hath been adjudged Moor pl. 596. 3 Cro. 460. *ibid.* 624. It is at the Plaintiffs Election to follow the Sheriff with Amerciements, or to bring his Action for the false Return. And when this Action has been brought formerly, they were forced to plead the Statute; none ever demurred generally. Twisd. I remember a case in 21 Car. 1. Rot. 616. between Franklin & Andrews, where an Action upon the Case was brought against a Sheriff for such a false Return: he pleaded the Statute, and they held in that case, that the Sheriff could not return any thing else but *Cepi Corpus*. And old Hodson, that sate here, remembred the Case of Langton & Gardiner reported in 3 Cro. and said, the Court did amerce the Sheriff for a bad Return; but the Judgment was given in that case for the Plaintiff, because there was a *Traverse aliter vel alio modo*, which could not be, unless a false Return had been confessed, and the Court ordered Judgment to be entred for

(1.)
23 H. 6. c. 10.
Ante 33. pl. 80.
2 Sand. 155.

Post. 239.

Post. 244.

the Plaintiff for that cause. In the case of Franklyn, the Court held, that upon Issue Not-guilty, the Statute might be given in Evidence : but upon a Demurrer you ought to plead the Statute, and the general Demurrer cannot be help'd in this case, unless you will say that it is a general Law. Whelpdale's case is, that the Statute must be pleaded, because it is a particular Law : but it concerns Extortion in all Sheriffs ; and the Statute of 13 Eliz. that concerns all Parsons, touching Non-residency, is held to be a general Law : and it is not to be stir'd now ; but if the point were to be adjudged again, perhaps we might be of another Opinion. Keeling. They have rely'd here upon the false Return, and the general Demurrer I take to be well enough. Moreton & Rainsford accorded ; wherefore Judgment was given against the Plaintiff.

4 Co. 120. b.
Post 205.
1 Sid. 24

Lake *versus* King.

(2.)
1 Sand. 131.
1 Sid. 414.
Hardr. 470.

4 Co. 14. b.

Hob. 252.

The Plaintiff brought an Action upon the Case for publishing a Libel, in which he was defamed, &c. the publication was in delivering several Printed Papers, wherein the Plaintiff was slandered, to several Members of a Committee of the House of Commons. Jones. It is true, if a man make a complaint in a Legal way, no Action lyeth against him for taking that course, if it be in a competent Court. But that that we say is not lawful in this case, is his causing the matter to be Printed and Published : Agreeable to this case are the common cases of Letters : if a man will write a scandalous Letter, and deliver it to the party himself, this is no Slander. But if he acquaints a third person with it, an Action will lie. So here, since he will publish this matter by Printing it, or if he had but written it, it might have been Actionable : for the Members ought not to be prepossessed.

King

King *versus* Standish.

AN Action upon the Statute of Præmunire for impeaching in the Chancery a Judgment given in the King's Bench. The Defendant demurred. Bigland for the Defendant. The question is, whether the Court of Chancery be meant within the Statute of 27 E. 3. 3. This question has been controverted formerly, but has not been stir'd within these 40 years last past. It concerns the Chancery, as it is a Court of Equity. Now the Statute cannot be applied to the Chancery as such; for it was not a Court of Equity at that time; and if so, then must the Statute be applied to other Courts, where the gravamen then was. Mr. Lambert in his Jurisdiction of Courts, says of this Court, that the King did at first determine Causes in Equity in person; and that about 20 E. 3. the King going beyond Sea, delegated this power to the Chancellor. And then he says, several Statutes were made to enlarge the Jurisdiction of this Court, as 17 R. 2. cap. 6. &c. But the Chancellor took not upon him ex Officio, to determine matters in Equity, till Edward the Fourth's time. For till then it was done by the King in person, or he delegated whom he pleased. So that the Gravamen of that Statute could not be in the Chancery. It is not possible that the King can be disinherited in his own Courts: and therefore the Statute must be understood of Courts, that stand in opposition to the King's Courts, and only foreign Courts. But this Court is held by the King's Seal, and the Judgments in it are according to the King's Conscience. Thirdly, It is said in the Statute, that the Offenders shall have a day given them to appear before the King and his Council, or in his Chancery, &c. and it is strange that the Chancery should give the remedy, if that were one of the Courts wherein the Offence were incurred. My fourth reason is from the penalty; the penalty is very rare and great; for they must be put out of the King's Protection, their Lands forfeited, and their bodies imprison'd at the King's pleasure. The penalty is fitted well for those that draw the King's Subjects out of the King's Jurisdiction; but so great a penalty to be inflicted for suing in the King's Courts, is not so reasonable. If a man sue in the Ecclesiastical Court for a matter Tem-

1. l. 1. h. 463.
1. l. 241. 2.
1. l. 402. 661.
(3) 707.
1. l. 463.
Cary 4, 106.
Raym. 227. 1. l.
1. l. 241. 1. l.

poal, shall he incur a Præmunire? An Action upon the Case may lie, when a man is mistaken in the Court, in which he ought to sue, but to make it a Præmunire seems not so reasonable. The Usurpations of the Bishop of Rome were the cause of the making of this Statute, and all other Statutes of Præmunire, 28 Ed. 3. cap. 1. 16 H. 6. cap. 5. the complaint was all along of the Bishop of Rome's Usurpations; but not a word of the Chancery. Sir John Davies in his case of Præmunire tells us, that all the Statutes were made upon this occasion. Of all the Attainders of Præmunire, there never was one for suing in the Chancery. The great Objection is from these words in the Statute, (or which do sue in any other Court) now, say they, this last disjunctive must be applied to this Court, and not to the Court or Courts mentioned before. But I answer, there were other Ecclesiastical Courts within this Realm, besides that that was a standing Court, and had a constant dependance upon the Pope here; and they were aimed at by this disjunctive. Those Courts derived their Jurisdiction from the Court of Rome, and not from the King. There is an Authority in the point in 5 E. 4. 6. Now for Authorities, I confess there are great ones against me, 2 Cro. f. 335. Heath & Ridley. Moor 838. Courtney *versus* Glanvil. My Lord Coke in his Chapter of Præmunire, 22 E. 4. f. 37. But the greatest Authority against me is the case of Throgmonton & Finch, reported by my Lord Coke in his Treatise of Pleas of the Crown, Chapter Præmunire. But the Practice has been contrary, not one person attainted of a Præmunire for that cause. In King James his time the matter was referred to the Counsel, who all agreed, that the Chancery was not meant within the Statute: which Opinions are enrolled in Chancery. And the King upon the report of their Reasons, ordered the Chancellor to proceed as he had done; and from that time to this, I do not find that this point ever came in question. And so he prayed Judgment for the Defendant. Saunders. As to that objection, that at the time when this Statute was made, there were no proceedings in Equity: I answer, that granting it to be true, yet there is the same mischief: The proceedings in one part of the Chancery are coram Domino Rege in Cancellaria, but an English Bill is directed to the Lord Keeper, and decreed; so that there is a difference in the proceedings of the same Court. But admit that Courts of Equity are the

2 Cro. 343.
3 Inst. 124.
1 Roll. 387.
pl. 2.

3 Inst. 124.

the King's Courts, yet they are alia Curia, if they hold plea of matters out of their Jurisdiction. 16 R. 2. cap. 5. Rolls first part 381. There is a common objection, that if there were no relief in Chancery, a man might be ruined: for the Common Law is rigorous, and adheres strictly to its rules. I cannot answer this Objection better than it is answered to my hand in Dr. & Stud. lib. 1. cap. 18. He cited 13 R. 2. num. 30. Sir Robert Cotton's Records. It is to be considered what is understood by being impeached: Now the words of another Act will explain that, viz. 4 H 4. cap. 23. by that Post. 94. Act it appears, that it is to draw a Judgment in question any other way than by Writ of Error or Attaint. One would think this Statute so fully penned, that there were no room for an evasion. There was a temporary Statute which is at large in Rastall 31 H. 6. cap. 2. in which there is this clause; viz. That no matter determinable at Common Law, shall be heard elsewhere. A fortiori, no matter determined at Common Law shall be drawn in question elsewhere. He cited 22 Ed. 4. 36 Sir Moyle Finch & Throgmorton, 2 Inst. 335. and Glanvill & Courtney's case. He put them also in mind of the Article against Cardinal Woolsey in Coke's Jurisdiction of Courts, tit. Chancery. So he prayed Judgment for the Plaintiff Keeling. It is fit that this cause be adjourned into the Exchequer-Chamber, for the Opinions of all the Judges to be had in it. We know what heats there were betwixt my Lord Coke & Ellesmere, which we ought to avoid.

Turner & Benny.

A Writ of Error was brought to reverse a Judgment in the Common Pleas in an Action upon the Case: (4.)
 wherein the Plaintiff declared, that it was agreed between himself and the Defendant, that the Plaintiff should surrender to the use of the Defendant certain Copy-hold Lands; and that the Defendant should pay for those Lands a certain sum of money: and then he sets forth, that he did surrender the said Lands into the hands of two Tenants of the Manor out of Court, secundum consuetudinem, &c. Exception. The promise is to surrender generally, which must be understood of 2 Keb. 666.

of a surrender to the Lord or to his Steward : and the Declaration sets forth a surrender to two Tenants; which is an imperfect surrender : 1 Cro. 299. Keeling. But in that case there are not the words *secundum consuetudinem*, as in this case. Jones. Hill. 22 Car. 1. Rot. 1735. betwixt Treburn & Purchas, two points were adjudged : 1. That when there is an agreement for a surrender generally, then such a particular surrender is naught. 2. That the alledging of a surrender *secundum consuetudinem* is not sufficient : but it ought to be said, that there was such a Custom within the Manor, and then, that according to that Custom he surrendered into, &c. accordingly is 3 Cro. 385. Coleman contra. We do say that we were to surrender generally, and then we aver, that actually we did surrender *secundum consuetudinem* : and if we had said no more, it had been well enough. Then the adding, into the hands of two Tenants, &c. I take it that it shall not hurt. Besides, we need not to alledge a performance, because it is a mutual promise, and he cited Camphugh & Brathwair's case Hob. 88, 106. Hob. Twisden. I remember the case of Treburn; he was my Client. And the reason of the Judgment is in Combe's case 9th Rep. because the Tenants are themselves but Attornies. And they compared it to this case : I am bound to levy a Fine : it may be done either in Court or by Commission, but I must go and know of the person to whom I am bound, how he will have it, and he must direct me. In the principal case the Judgment was affirm'd, Nisi, &c.

Turner & Davies.

(5.)
2 Keb. 668.
2 Sand. 148.

A Udiva Querela. The point was this ; viz. an Administrator recovers damages in an Action of Trover and Conversion for Goods of the Intestate taken out of the possession of the Administrator himself : then his Administration is revoked, and the question is, whether he shall have Execution of the Judgment, notwithstanding the revocation of his Administration ? Saunders. I conceive he cannot, for the Administration being revoked, his Authority is gone. Doctor Druries case in the 8th Report, is plain. And there is a Precedent in the new book of Entries 89. Barrell. I conceive he may

may take out Execution, for it is not in right of his Administration: he lays the Conversion in his own time: and he might in this case have declared in his own name; and he cited and urged the reason of Pakman's case, 6th Report, & 1 Cro. Keeling. He might bring the Action in his own name, but the Goods shall be Assers. If Goods come to the possession of an Administrator, and his Administration be repealed, he shall be charged as Executor of his own wrong: now in this case, the Administration being repealed, shall he sue Execution to subject himself to an Action when done? Twissden. I think it hath been ruled, that he cannot take out Execution, because his Title is taken away. Judgment per Curiam *versus* Defendentem. Cro. Car. 208; 227. Cart. 134. Yelv. 83, 125.

Jordan & Martin.

Exception was taken to an Abowry for a Rent charge, that the Abowant having distrained the Beasts of a Stranger for his Rent, does not say that they were levant & couchant. Coleman. The Beasts of a Stranger are not liable to a Distress, unless they be levant & couchant: Roll. Distress, 668. 672. Reignold's case. Twissd. Where there is a Custom for the Lord to seize the best Beast for a Heriot, and the Lord does seize the best Beast upon the Tenancy, it must come on the other side to shew that it was not the Tenant's Beast. Keel. The Cattel of a Stranger cannot be distrained, unless they were levant & couchant; but it must come on the other side to shew that they were not so. So Judic. pro Defend. (6.) 2 Sand. 289, 290. Co. Lit. 47. Co. Lit. 475.

Wayman & Smith.

A Prohibition was prayed to the Court of Bristol upon this suggestion; viz. That the cause of Action did not arise within the Jurisdiction of the Court. Winnington. There was a case here between Smith & Bond, Hill. 17 Car. 2. Rot. 501 a Prohibition to Marleborough: the suggestion grounded on Westm. 1. cap. 34. granted: And there needs not a Plea in the Spiritual Court, to the Jurisdiction: for that he cited F. N. B. (7.) 1 Sid. 464. 2 Inst. 230.

Post. 81.

F.N.B. 49. But he said, he had an Affidavit, that the cause of Action did arise out of their Jurisdiction, Twifden. I doubt you must plead to the Jurisdiction of the Court. I remember a case here, wherein it was held so : and that if they will not allow it, then you must have a Prohibition. Winnington. Fitzherbert is full. Ruled, that the other side shall shew cause why a Prohibition should not go, and things to stay.

Humlock & Blacklow.

(8.)
1 Sid. 464.
2 Sand. 155.

DEbt upon a Bond for performance of Covenants in Articles of agreement. The Plaintiff covenanted with the Defendant to assign over his Trade to him, and that he should not endeavour to take away any of his Customers ; and in consideration of the performance of these Covenants, the Defendant did Covenant to pay the Plaintiff 60 l. per annum during his life. Saunders. The words in consideratione performanceis, make it a Condition precedent : which must be averred ; 3 Leon. 219. and those Covenants must be actually performed. Twifden. How long must he stay then, till he can be entitled to his Annuity ? as long as he lives ? for this Covenant may be broken at anytime. That's an Exposition that corrupts the Text. Judic. nisi, &c.

(9.)
Priviledges.

It was moved by one Hunt, that the Venue might be changed in an Action of Indebitat. Assumpsit, brought by Mr. Wingfield. Jones. I conceive it ought not to be changed, being in the case of a Counsellor at Law, by reason of his attendance at this Court. Twifd. In Mr. Bacon's case of Grays-Inn, they refused to change the Venue in the like case. So not granted.

(10.)
Wales.

An Indictment against one Morris in Denbigh-shire, for Murder, was removed into the King's Bench by Certiorari, to prevent the Prisoners being acquitted at the Grand-Sessions ; and the Court directed to have an Indictment found against him in the next English County ; viz. at Shrewsbury. Vide infra.

Taylor

Taylor & Rouse, *Church-wardens of*
Downham, versus their Predecessors.

The Action was, to make them Account for a Bell. They plead, that they delivered it to a Bell-founder, to mend, and that it is yet in his hands. The Plaintiff demurs; the cause of his Demurrer was, that this was no good Plea in Bar of the Account, though it might be a good Plea before Auditors. 1 Roll 121. Pemberton. I conceive it is a good Plea; for wherever the matter or cause of the Account is taken off, the Plea is good in Bar. But he urged, that the Action was brought for taking away bona Ecclesie, and not bona Parochianorum, as it ought to have been. Court. The Property is not well said. So ordered to mend all, and plead de novo. (II.)

Term. Mich. 22 Car. II. 1670. in B. R.

(12.)

1 Cro. 580.

2 Rol. 898.

An Inquisition was returned upon the Statute against pulling down Inclosures. They took Issue as to the damages only. It was moved, that before the Trial for the damages, there might be Judgment given to have them set up again, having been long down. Twifden. When you have Judgment for the damages, then one Distringas will serve for setting up the Inclosures and the damages too. As in an Action, where part goes by default, and the other part is traversed, you shall not take out Execution, till that part which is traversed be tried.

(13.)
Arrest.

Upon a motion by Mr. Dolbin for an Attachment, Twifden said; if a man has a Suit depending in this Court, and he coming to Town to prosecute or defend it here, he cannot be sued elsewhere. But if a man come hither as a Witness, he is protected eundo & redeundo.

Wootton & Heal.

(14.)

2 Sand. 177.
1 Sid. 466.

Post. 101.
2 Cro. 444.

An Action of Covenant was brought upon a Warranty in a fine, a term for years being Evicted. Saunders. I acknowledge, that an Action of Covenant does well lye in this case: but the Plaintiff assigns his breach in this; viz. that one Stowell habens legale jus & titulum, did enter upon him and evict him; which perhaps he did by virtue of a title derived from the Plaintiff himself: 2 Cro. 315. Kirby & Hansaker. Jones contra. To suppose that Stowell claimed under the Plaintiff, is a foreign Intendment: and it might as well come on the Defendant's side to show it: And since that case in 2 Crook, the Statute of 21 Jac. and the late Act, have much strengthened Verdicts. Twifden. The Statutes do not help when

when the Court cannot tell how to give Judgment. The Plaintiff ought to entitle himself to his Action, and it is not enough if the Jury entitle him. Jones. You have waived the Title here, and relied upon the Entry of the Issue only, which is non intravit, &c. Cur. advisare vult. *Infra* 290. pl. 37.

Lassells & Catterton.

AN Action of Covenant for further assurance, the Covenant being to make such Conveyance, &c. as Counsel should advise; they alledge for breach, that they tendered such a Conveyance as was advised by Counsel; viz. a Lease and Release, and set it forth with all the usual Covenants. Levins moved in Arrest of Judgment; I conceive they have tendered no such Conveyance as we are bound to execute; for we are not obliged to Seal any Conveyance with Covenants, nor with a Warranty. Besides, that which they have tendered, has a Warranty, not only against the Covenantors, but one Wilson: 2 Cro. 571. 1 Rolls 424. Again, our Covenant is, to convey all our Lands in Bomer: and the Conveyance tendered, is of all our Land in the Lordship of Bomer. Twifden. For the last exception, I think we shall intend them to be both one: And I know it hath been held, that if a man be bound to make any such reasonable assurance, as Counsel shall advise, usual Covenants may be put in; for the Covenant shall be so understood. But there must not be a Warranty in it: though some have held, that there may be a Warranty against himself; but I question whether that will hold. But Weston on the other side said, that the Objection as to the Warranty was fatal, and he would not make any defence. (15.)
1 Sid. 467.
Raym. 190.

The King *versus* Morris. *Vid. sup.* 64. pl. 10.

(16.)
2 Keb. 685.

MR. Attorney Finch shewed cause why a Certiorari should not be granted to remove an Indictment of Murder out of Denbighshire in Wales. Twisden. In 2 Car. & 8 Car. it was held, that a Certiorari did lie into Wales. Moreton. By 34 H. 8. the Justices of the great Sessions have power to try all Murthers, as the Judges here have, and the Statute of 26 H. 8. for the Trial of Murthers in the next English County, was made before that of the 34 H. 8. Twisden. I never yet heard that the Statute of 34 H. 8. had repealed that of 26 H. 8. It is true, the Judges of the Grand Sessions have power, but the Statute that gives it them, does not exclude this Court. To be moved when the Chief Justice should be in Court.

Franklyn's Case.

(17.)
17 Car. 2. c. 2.
S. 5. N. 1.

FRanklin was brought into Court by Habeas Corpus, and the Return being read, it appeared that he was committed as a Preacher at Seditious Conventicles. Coleman prayed he might be discharged; he said this Commitment must be upon the Oxford Act: for the last Act only orders a Conviction; and the Act for Uniformity, Commitment only after the Bishops Certificate. And the Oxford Act provides, that it shall be done by two Justices of the Peace upon Oath made before them: and in this Return, but one Justice of Peace is named; so Sir William Palmer is mentioned as Deputy Lieutenant, and you will not intend him to be a Justice of Peace. Nor does it appear that there was any Oath made before them. Twisden. Upon the Statute of the 18th of the Queen, that appoints that two Justices shall make Orders for the keeping of Bastard-children, whereof one to be of the Quorum, I have got many of them qual'd, because it was not exprest, that one of them was of the Quorum. Whereupon Franklin was discharged.

Upon

Upon a motion for time to plead in a great cause about (18.)
 Brandy, Twisden said, if it be in Bar, you cannot demand Oyer. Br.
 Oyer of the Letters Patents the next Term; but if it be in
 a Replication, you may; because you mention the precedent 5 Co. 75. 2.
 Term in the Bar, but not in the Replication.

Yard & Ford.

Moved by Jones in Arrest of Judgment; an Action upon (19.)
 the Case was brought for keeping a Market without 2 Sand. 17.
 Warrant, it being in prejudice of the Plaintiffs Market. He
 moved, that the Action would not lie, because the Defendant
 did not keep his Market on the same day that the Plaintiff
 kept his: which he said is implied in the case in 2 Rolls 140.
 Saunders contra. Upon a Writ of Ad quod dampnum, they
 enquire of any Markets generally, though not held the same
 day. In this case, though the Defendant's Market be not
 held the same day that ours is, yet it is a damage to us in
 forestalling our Market. Twisden. I have not observed that
 the day makes any difference. If I have a Fair or Market,
 and one will erect another to my prejudice, an Action will lie;
 and so of a Ferry. Its true, for one to set up a School by 2 Roll. 140.
 mine, is damnum absque injuria. Ordered to be moved G. 4.
 again. 1 Roll. 117.
 pl. 11.

Pawlett moved in Trespass, that the Defendant pleaded in (20.)
 Bar, that he had paid 3 l. and made a promise to pay so much
 more in satisfaction; and said it was a good plea, and did
 amount to an accord with satisfaction; an Action being but a
 Contract, which this was. Twisden. An Accord executed is
 pleadable in Bar, but Executory not. Accord.
 1 Roll. 129.
 pl. 13.
 Supr. 7. pl. 21.
 9 Co. 79.

Twisden. There are two clauses in the Statute of Usury; (21.)
 if there be a corrupt agreement at the time of the lending of Usury.
 the money, then the Bonds and all the Assurances are void: 2 Mod. 307.
 but if the agreement be good, and afterward he receives more 1 Sand. 294.
 than he ought, then he forfeits the treble value. 37 H. 8. c. 9.

Bonnefield.

(22.)
Noim.

1 Cro. 199.

HE was brought into Court upon a Cap. Excom. and it was urged by Pawlett that he might be delivered, for that his name was Bonnefield, and the Cap. Excom. was against one Bromfield. Twisden. You cannot plead that here to a Cap. Excom. You have no day in Court, and we cannot Bail upon this ; but you may bring your Action of False Imprisonment.

Caterall & Marshall.

(23.)

1 Sid. 270.

Action upon the Case, wherein the Plaintiff declares, that in consideration that he would give the Defendant a Bond of sufficient penalty to save him harmless, he would, &c. and sets forth, that he gave him a Bond with sufficient penalty, but does not express what the penalty was. This was moved in Arrest of Judgment. Jones. After a Verdict it is good enough, as in the case in Hob. 69. Twisden. If it had been upon a Demurrer, I should not have doubted but that it had been naught. Rainsford & Moreton. But the Jury have judged the penalty to be reasonable, and have found the matter of fact. Twisden. The Jury are not Judges what is reasonable, and what unreasonable : but this is after a Verdict. And so the Judgment was affirm'd, the cause coming into the King's Bench upon a Writ of Error.

Martin & Delboe.

(24.)
1 Sid. 465.

An Action upon the Case, setting forth, that the Defendant was a Merchant, and transmitted several Goods beyond Sea, and promised the Plaintiff, that if he would give him so much money, he would pay him so much out of the proceed of such a parcel of Goods as he was to receive from beyond

beyond Sea. The Defendant pleaded the Statute of Limitations, and doth not say, non assumpsit infra sex annos, but that the cause of Action did not arise within six years. The Plaintiff demurs, because the cause is between Merchants, &c. Symphon. The plea is good; Accounts within the Statute must be understood of those that remain in the nature of Accounts: now this is a sum certain. Jones accorded. ^{Post. 270.} This is an Action upon the Case, and an Action upon the Case between Merchants is not within the exception. And the Defendant has pleaded well in saying, that the cause of Action did ^{Post. 89.} not arise within six years: for the cause of Action ariseth from the time of the Ships coming into Port; and the six years are to be reckoned from that time. Twisden. I never ^{2 Sand. 127.} knew but that the word Accounts in the Statute was taken only for Actions of account. An insimul computasset brought for a sum certain, upon an account stated, though between Merchants, is not within the Exception. So Judgment was given for the Defendant.

The King *versus* Leginham.

An Information was exhibited against him for taking unreasonable Distresses of several of his Tenants. Jones ^(25.) ^{Post. 288.} moved in arrest of Judgment, that an Information would not lye for such cause. Marlebr. cap. 4. saith, that if the Lord take an unreasonable Distress, he shall be amerced, so that an Information will not lye. And my Lord Coke upon Magna Carta, says the party grieved may have his Action upon the Statute: but admit an Information would lye, yet it ought to have been more particular, and to have named the Tenants; it is not sufficient to say in general, that he took unreasonable Distresses of several of his Tenants. And the second part of the Information, viz. that he is communis oppressor, is not sufficient: Rolls 79. Moor 451. Twisden. It hath so been adjudged, that to lay in an Information, that a man is communis oppressor, is not good. And a Lord cannot be indicted for an excessive Distress, for it is a private matter, and the party ought to bring his Action. To stay. *Infra* 288. pl. 34.

Haman & Truant.

(26.)

Co. Lit. 126. a.
Yelv. 38.
1 Sand. 102.
1 Cro. 164.
2 Sand. 189.

AN Action upon the Case brought upon a bargain for Corn and Grains, &c. The Defendant pleads another Action depending for the same thing. The Plaintiff replies, that the bargains were several; absque hoc, that the other Action was brought for the same cause. The Defendant demurs specially, for that he ought to have concluded to the Country. Polysfen. When there is an affirmative, they ought to make the next an Issue, or otherwise they will plead in infinitum. 3 Cro. 755. and accordingly Judgment was given for the Defendant.

Fox & alii Executors of Mr. Pinfent.

Vide supra 47. pl. 102.

(27.)

3 Cro. 541.
2 Rol. 207.

INdebitat. Assumpsit: The Defendant pleads, that two of the Plaintiffs are Infants, and yet they all Sue per Attornatum. The question is, if there be two Executors, and one of them under age, whether the Infant must sue per Guardianum, and the other per Attornatum, or whether it is not well enough, if both sue per Attornat. Offley spake to it, and cited 2 Cro. 541. Pasch. 11 Car. 288. Powell's case, Styles 318. 2 Cro. 577. 1 Inst. 157. Dyer 338. Moreton. I am of Opinion that he may Sue by Attorney, as Executor: though if he be Defendant, he must appear by Guardian. Rainsford. I think it is well enough; and I am led to think so by the multitude of Authorities in the point: And I think the case stronger when Infants joyn in Actions with persons of full age. He Sues here in auter droit; and I have not heard of any Authority against it. Twisden concurred with the rest, and so Judgment was given. *Infra* 296. pl. 40.

Moreclack

Moreclack & Carleton.

UPON a Writ of Error out of the Court of Common Pleas, one Error assigned was, that upon a relicta verificatione, a misericordia was entered, whereas it ought to have been a Capiatur. Twisden. The Common-Pleas ought to certify us what the Practice of their Court is. Monday the Secondary said, it was always a Capiatur. Its true in 9 E. 4. it is said that he shall but be amerced, because he hath spared the Jury their pains; and 34 H. 8. is accordingly: but say they in the Common-Pleas, a Capiatur must be entered, because *dedicit factum suum*. So they said they would discourse with the Judges of the Common-Pleas concerning it.

(28.)
Raym. 195.
2 Sand. 191.

The King *versus* Holmes.

Moved to quash an Indictment of Forcible Entry into a Messuage, passage or way: for that a passage or way is no Land nor Tenement, but an easement: and then it is not certain whether it were a passage over Land or Water: Yelv. 169. the word *passagium* is taken for a passage over Water. Twisd. You need not labour about that of the passage; we shall quash it as to that: but what say you to the Messuage? Jones. It is naught in the whole: for it is but by way of recital, with a *quod cum*, he was possessed, &c. *Et sic possessionatus*, &c. but that Twisden said, was well enough. Jones. Then he saith, that he was possessed *de quodam Termino*: and doth not say *annorum*. Twisden. That's naught. And the Indictment was quash'd.

(29.)

An Action was brought against the Hundred of Stoak, upon the Statute of Hue and Cry: and at the Tryal, some House-keepers appeared as Witnesses, that lived within the Hundred, who being examined, said they were Poor, and paid no Tares nor Parish-Duties: and the question was, whether they were good Witnesses or not? Twisden. Alms-people and

(30.)
2 Keb. 73.

L

Ser.

Servants are good Witnesses: but these are neither. Then he went down from the Bench to the Judges of the Common-Pleas to know their Opinions; and at his return said, That Judge Wyld was confident that they ought not to be sworn, and that Judge Tyrrel doubted at first; but afterwards was of the same Opinion: their reason was, because when the Pony recovered against the Hundred should come to be levied, they might be worth something.

Hoskins *versus* Robins.

Hill. 23 Car. II. Rot. 233.

In this Case these Points were spoke to in Arrest of Judgment, viz. 1. Whether a Custom to have a several Pasture excluding the Lord, were a good Custom, or not? It was said, that a Prescription to have Common so, was void in Law; and if so, then a Prescription to have sole Pasture, which is to have the Grass, by the Mouth of the Cattle, is no other than Common Appendant: Daniel's Case, 1 Cro. so that Common and Pasturage is one and the same thing. They say, that it is against the nature of Common, for the very word Common supposeth that the Lord may feed. I answer, if that were the reason, then a Man could not by Law claim Common for half the year, excluding the Lord: which may be done by Law. But the true reason is, that if that were allowed, then the whole profits of the Land might be claimed by Prescription, and so the whole Land be prescribed for. The Lord may grant to his Tenants to have Common, excluding himself: but such a Common is not good by prescription. The second Point was, whether or no the Prescription here not being for Beasts levant and couchant, were good or not: for that a difference was made betwixt Common in gross and Common appendant, viz. That a man may prescribe for Common in gross without those words; but not for Common appendant. 2 Cro. 256. 1 Brownl. 35. Noy 145. 15 Edw. 4. f. 28, 32. Rolls tit. Common 388. Fitz. tit. Prescription 51. A third Point was, whether or no these things are

(31.)
2 Sand. 1324
2 Lev. 2
Foll. 113
No. 10. 11.
12. 2. 11.

are not help'd by a *Verdict*? As to that, it was alledged, that they are defects in the Title, appearing on Record: and that a *Verdict* doth not help them. Sanders contra. In case of a Common such a Prescription is not good, because it is a contradiction, but here we claim *solam Pasturam*. Now what may be good at this day by Grant, may be claimed by Prescription. As to the Exception that we ought to have prescribed for Cattle levant and couchant: its true, if one doth claim Common for Cattle, levant and couchant is the measure for the Common, unless it be for so many Cattle in number: but here we claim the whole *Herbage*; which perhaps the Cattle levant and couchant will not eat up. Hales. Notwithstanding this Prescription for the sole Pasture, yet the Soil is the Lords, and he hath *Vines, Trees, Buzhes, &c.* and he may dig for *Turfs*. And such a Grant, viz. of the sole Pasturage, would be good at this day. 18 E. 3. though a Grant by the Lord, that he will not improve, would be a void Grant at this day. Twisden. My Lord Coke is express in the Point. A Man cannot prescribe for sole Common, but may prescribe for sole Pasture. And there is no Authority against him. And for levant and couchant; it was adjudged in *Stoneby and Muckleby's Case*, that after a *Verdict* it was helped. And Judgment was given accordingly.

1 Sand. 227.

Anonymus.

AN Action of *Trespas* was brought for taking away a Cup, till he paid him twenty Shillings. The Defendant pleads, that *ad quendam Curiam* he was amerced, and that for that the Cup was taken, Hales. We cannot tell what Court it is, whether it be a Court Baron by Grant or Prescription; if it be by Grant, then it must be *coram Seneschallo*; if by Prescription, it may be *coram Seneschallo*, or *coram Scetatoribus*, or *coram both*. Then it does not appear, that the House where the *Trespas* was laid, was within the Manor: Then he doth not say *infra Jur' Cur'*. It was put upon the other side to shew cause.

(32.)
Court-
Baron.

Jacob Hall's Case.

(33.)
33 H. 8. c. 9.

One Jacob Hall a Rope-Dancer, had erected a Stage in Lincolns-Inn-Fields: but upon a Petition of the Inhabitants, there was an Inhibition from Whitehal: now upon a Complaint to the Judges, that he had erected one at Charing-Cross, he was sent for into Court: and the Chief Justice told him that he understood it was a Nuisance to the Parish: and some of the Inhabitants being in Court, said, that it did occasion Broils and Fightings, and drew so many Rogues to that place, that they lost things out of their Shops every afternoon. And Hales said, that in 8 Car. 1. Noy came into Court, and prayed a Writ to prohibit a Bowling-Ally erected near St. Dunstan's Church, and had it.

*See Hines
625.*

Sir Anthony Bateman's Case.

(34.)
Assurances.

In the Tryal at Bar, the Son and Daughter of Sir Anthony Bateman were Defendants: the Action was an Ejectione Firmæ. The Defendants admitted the point of Sir Anthony's Bankruptcy: but set up a Conveyance made by Sir Anthony to them for the payment of 1500 l. a piece, being Money given them by their Grandfather, Mr. Russell, to whom Sir Anthony took out Administration. Hales. It is a voluntary Conveyance, unless you can prove that Sir Anthony had Goods in his hands of Mr. Russell, at the time of the executing it. So they proved that he had, and there was a Verdict for the Defendants.

*Infra 119.
pl. 21.*

Legg & Richards.

Ejectment. Judgment against the Defendant, who dies, (35.)
 and his Executor brings a Writ of Error, and is non-
 Colts. 10th Decr 166.
 suited. It was moved that he should pay Costs. Twissden.
 An Executor is not within the Statute for payment of Costs
 occasione dilationis. Hales. I am of the same Opinion.

Harwood's Case.

He was brought to the Bar by Habeas Corpus : being (36.)
 committed by the Court of Aldermen for marrying an
 Orphan without their consent. Sol. North. We conceive the
 Return insufficient, and that it is an unreasonable Custom to
 impose a Penalty on a Man for marrying a City Orphan in
 any place of England. Now we married her far from Lon-
 don, and knew not that she was an Orphan. Then they
 have put a fine of 40 l. upon him, whereas there is no cause
 why he should be denied Marriage with her, there being no
 disparagement. Twissden. Mr. Waller of Beckonsfield was
 imprisoned six Months for such a thing. So the Party was
 ordered to be brought into Court. Vide infra 79. pl. 43.

Leginham & Porphery.

J. l. 1. fol. 361. 2. Knt. 344.

Replevin and Abodry for not doing Suit. The Plain- (37.)
 tiff sets forth a Custom, that if any Tenant live at a
 distance, if he comes at Michaelmas and pay eight pence to the
 Lord, and a penny to the Steward, he shall be excused for not
 attending ; and then says, that he tendered eight pence, &c.
 and the Lord refused it, &c. Pollexfen. I know no Case where
 payment will do, and tender and refusal will not do. Hales.
 Have you averred, that there are sufficient Copy-holders that
 live near the Manor? Pollexfen. We have averred that
 there

there are at least 120. Hales. Surely tender and refusal is all one with payment. Twisden. An Award is made, that super receptionem, &c. a Man should give a Release, there tender and refusal is enough. Judgment for the Defendant.

Waldron *versus*, &c.

(38.)

Pol. 117.

Hales. It is true, one Parish may contain three Mills. The Parish of A. may contain the Mills of A. B. and C. that is when there are distinct Constables in every one of them. But if the Constable of A. doth run through the whole, then is the whole but one Mill in Law. Or where there is a Tything-Man, it may be a Mill: but if the Constable run through the Tything, then it is all one Mill. I know where three or four thousand pounds per Annum hath been enjoyed by a Fine levied of Land in the Mill of A. in which are five several Hamlets, in which are Tythings; but the Constable of A. runs through them all, and upon that was held good for all. Here was a Case of the Constable of Blandford-Forum, wherein it was held, that if he had a concurrent Jurisdiction with all the rest of the Constables, the Fine would have passed the Lands in all. In some places they have Tything-Men and no Constables. Pollexfen. Lambard 14. is, that the Constable and the Tything-Man are all one. Hales. That is in some places. Præpositus is a proper word for a Constable, and Decemarius for a Tything-Man.

(39.)
Apprentice.
1 Cro. 584.

An Indictment for retaining a Servant without a Testimonial from his last Master. Moved to quash it, because it wants the words contra pacem. 2. Because they do not shew in what Trade it was. So quash'd.

(40.)
Days.

Moved to quash another Indictment, because the year of our Lord in the Caption was in Figures. Hales. The year of the King is enough.

Moved

Moved for a Prohibition to the Spiritual Court, for that (41.)
 they sue a Parish for not paying a Rate made by the Church-
 wardens only; whereas by the Law, the major part of the ^{Infra 194.}
 Parish must joyn. ^{pl. 25.} Twisd. Perhaps no more of the Parish
 will come together. ^{5 Co. 63. a.} Counsel. If that did appear, it might be
 something.

Hales. A Writ of Error will lye in the Exchequer-Cham. (42.)
 ber of a Judgment in a Scire facias, grounded upon a Judg-
 ment in one of the Actions mentioned in the 27 Eliz. cap. 8. ^{Error.}
 because it is in effect a piece of one of the Actions therein ^{2 Keb. 833.}
 mentioned. Hob. 72. 2 Inst. 25. 1 Cro. 286, 300, 464.

Harwood's Case. *Supra* 77. pl. 36.

HE was removed out of London by Habeas Corpus; the (43.)
 Return was, That he was fined and committed there ^{Marriage.}
 for marrying a City-Orphan without the consent of the Court
 of Aldermen. Exception 1. They do not say that the party
 was a Citizen, or that the Marriage was within the City:
 and they are not bound to take notice of a City Orphan out of
 the City, for their Customs extend only to Citizens in the
 City. Exception 2. They have not shewed that we had rea-
 sonable time to shew cause, why we should not be fined.
 Twissen. These Objections were over-ruled in one Waller's
 Case. Afterwards in the same Term Weston spake to it. There
 are two matters upon which the validity of this Return doth
 depend; viz. the Custom, and the Offence within the Cu-
 stom. The Custom is laid, that time out of mind the Court
 of Aldermen have had power to set a reasonable fine upon ^{Co. Lit. 136.}
 such as should marry an Orphan without their leave, and upon
 refusal to pay it, to imprison him. I conceive this Custom
 as it is laid, to be unreasonable: it ought to be locally cir-
 cumscribed, and confined to the City: 17 Ed. 4. 7. there was
 an Action brought upon the Statute of Labourers, for re-
 taining one that was the Plaintiffs retained Servant: the
 Defendant pleaded in abatement, that there was no place
 laid where the Plaintiffs retainer was: and this was held a
 good

good Plea; for that if it were in another County than where the Defendant retained him, it was impossible for the Defendant to take notice of a Retainer in another County. No more can we take notice who is a City Orphan in the County of Kent. Then, they have returned a Custom to imprison generally; but it should have been, that without reasonable cause shewn they might imprison, and the Party have liberty to shew cause to the contrary. Then I conceive they have returned the Fact as defective as the Custom: they say, that he married her without their consent; they ought to have said that he took her out of their custody; and your Lordships will not intend that she was in their custody, when she was out of the City. Offley of the same side; and cited 21 Ed. 3. Fitz. Guard. 31. and Hob. in Moor and Hussey's Case, 95. 3 Cro. 803. 3 Cro. 689. 1 Cro. 561. In all the Cases it's returned that they were Free-men of the City. M^r. Solicitor North on the same side, cited Day and Savage's Case. M^r. Attorney General on the other side, said, that because it was impossible to give notice to all, therefore ex necessitate rei, they must take notice at their Peril. Hales. The City has an Interest in the Orphan, wherever the Orphan be. And as for notice, he may enquire; there is no impossibility of his coming to the knowledge whether she be an Orphan or no; therefore if he takes her, he takes her at his Peril. Twifden. And for the Fine, such a Fine was set in Langham's Case, and adjudged good. Let a Citizen of London live where he will, his Children shall be Orphans. Hales. Some things are local in themselves; some things adherent to the person, and follow the person; now this is an Interest which follows the person, and is transmitted to his Children: and the party must take notice of it at his peril.

Cox & St. Albanes

A Prohibition was prayed for to the City of London, because the Defendant had offered a Plea to the Jurisdiction sworn, and it had been refused, Hales. In transitory Actions, if they will plead a matter that ariseth out of the Jurisdiction, and swear it before Imparlance, and it be refused, a Prohibition shall go. There was a case, in which it was adjudged; 1. That upon a bare surmise, that the matter ariseth out of the Jurisdiction, the Court will not grant a Prohibition. 2. It must be pleaded, and the Plea sworn, and it must come in before Imparlance. If all this were done, we would grant a Prohibition here. It was also agreed in that case, that the party should never be received to assign for Error that it was out of the Jurisdiction, but it must be pleaded. Twisd. So in this Court, when there is a Plea to the Jurisdiction, as that it is within a County Palatine, they plead it before Imparlance, and swear their Plea. (44.)

Twisden. There was a Venire facias returnable coram nobis apud Westm. whereas it should have been ubicunque fuerimus, &c. yet because the Court was held here, it was held to be good. Hales. I remember it. Hales. When in an inferiour Court the Venire facias is ad prox. Cur', it is naught, because it is uncertain when the Court will be kept. But if it be at such a day ad prox. Cur. it is good. (45.)

Anonymus.

A Writ of Error of a Judgment in White-chappel. After the Record was read, Hales said, the acts of a Court ought to be in the present Tense, as præceptum est, not præceptum fuit. But the acts of the party may be in the Preterperfect Tense: as venit & protulit hic in Cur' quendam querelam suam; And the Continuances are in the Preterperfect Tense, as venerunt, not veniunt. But upon another Exception the Court gave time to move it again. (46.)

¶

Moved

(47.)
2 Keb. 859.

4 Co. 57.

Moved for a melius inquirendum to be granted to the Coroner of Kent who had returned an Inquisition concerning the death of one that was killed within the Manor of Greenwich: he had returned, that he dyed of a Peagrim in his head, when he was really killed with a Coach. Hales. A melius inquirendum is generally upon an Office post mortem, and is directed to the Sheriff. Twisden. But this cannot be to the Sheriff. In 22 Ed. 4. the Coroner must enquire only super visum corporis. And if you will have a new inquiry, you must quash this. Indeed a new inquiry was granted in Miles Bartly's case. Thurland prayed that the Court, being the supreme Coroner, would examine the misdemeanour of the Coroner. Hales. Make some Oath of his misdemeanour, because he is a sworn Officer. Without Oath we will not quash this Inquisition. Newdigate said, that in the case of Miles Bartly the inquiry was not filed, and that that was the reason why a new one was granted. Hales. Let the Coroner attend; he must take the Evidence in writing; and he should bring his Examination into Court.

Daniel Appleford's Case.

(48.)
2 Keb. 799.

A Writ of Mandamus was directed to the Master and Fellows of New-Colledge in Oxford, to restore one Daniel Appleford a Fellow. They return, that the Bishop of Winchester did erect the Colledge, and among other Laws, by which the Colledge was to be governed, they return this to be one, viz. That if a Scholar, or other Member of the said Colledge should, commit any crime, whereby scandal might arise to the Colledge; and that it appeared by his own confession, or full Evidence of the fact, that then he should be removed without any remedy: and that Daniel Appleford a Fellow, was guilty of enormous Crimes, and was convicted, and thereupon removed: and they pray Judgment whether this Court will proceed? Jones. By this conclusion they rely chiefly upon the Jurisdiction of the Court. I will lay this for a ground, that this Court hath Jurisdiction in Extra-judicial causes as well as Judicial: 11 Rep. Bagg's case. And Apple-

Appleford hath no remedy but this. I will not say, that he may not have an Action upon the Case, but by that he will not recover the thing, but damages. And for an Assize; if a man be a Corporation sole, or head of a Corporation aggregate, and be turn'd out wrongfully, he may have an Assize: but for a man that is but an inferior Member of a Corporation, no Assize lyeth for him; because he is but a part of the body politick, and doth not stand by himself, but must joyn with others; and as he cannot have an Assize, so he cannot have an Appeal: Dyer 209. & 11 Co. in Bagg's case. 24 H. 8. 22. 25 H. 8. c. 19. 4 Inst. 340. by these Authorities, it appears that we are without remedy by way of Appeal. It may be objected, that there can be no Appeal hither, because it is a Spiritual Corporation. Now I say, this is not a Spiritual Corporation, as appears by the foundation: and I am of Opinion, that if a Corporation be all of Spiritual persons, yet unless there be a Spiritual end, it is no Spiritual Corporation, but a Lay one. But if it be a Spiritual Corporation; yet Deposition is a Temporal act, Dyer 209. Another Objection may be, that the Founder hath provided that there shall be no Appeal. I answer, the Founder cannot by his foundation exclude legal remedies against wrong. A Custom, which is the strongest Foundation, doth not bind a man up from his legal remedy: Lit. Sect. 212. If a man should dispose of his Estate by Will, and provide therein, that if any difference should arise concerning the Execution of the same, that it shall be determined by such and such, and no Suit commenced upon it at the Common Law, this would be a vain appointment: he must not erect a Jurisdiction of his own, to oust the King's Courts of theirs. Coleman. I conceive this is such a Colledge, as no Mandamus shall go to it in any case whatsoever; for it is but a private Society, and hath no influence upon the publick. In Ryly's Records we find, that Mandamus's were only Letters to Colledges, &c. and there were no Judicial Mandamus's till Bagg's case; and I never knew them go, but when the party had not only a Freehold, but one that was of publick concern. Now a Fellowship of a Colledge is for a private design, only to study: and if you grant a Mandamus in this case, whither will it go at last? Then the Foundation was to a Spiritual intent; and what is committed to the Ecclesiastical Power and Jurisdiction, this Court doth preserve. Ecclesiastical men hold in Eleemosynam, Lit. Sect. 136. Lin-

1 Sid. 29.

wood de Religiosis domibus. When Colledges are founded under rule and order, it doth give the Bishop Jurisdiction: so that this Court will not enquire into this matter, no more than it will enquire into causes of Depprivation, and matters relating to the Institution of Clergy-men. It has been denied, that a Fellow of a Colledge can bring an Assize. But as a Prebend hath two capacities, sole and aggregate: so a Fellow is a Member of a Corporation aggregate, and hath a sole capacity in respect of his Fellowship. For a Church-Warden who is admitted according to the course of the Ecclesiastical Law, a Mandamus will not lie: Vide 6 H. 7. 10. Twisden. In one Patrick's case, we all held that a Colledge was a Temporal Corporation. Hales. There is a reason given in Dyer why a Mandamus will not lie in the case there, viz. because it was prayed to be awarded to a Temporal Corporation. Coleman. It doth appear by the Return, that the Founder hath appointed a Visitor, now to him there may be an Appeal; and we have returned the Sentence of the Visitor, and need not return the cause of the Sentence. And for Books, I do oppose Rolls, tit. Prerogative, Huntly's case, 209. to Specott's case and Ken's case in the Reports. In our case the party has a remedy elsewhere, and therefore he shall not come hither. If a Mandamus shall lie for a Mastership, Fellowship or Scholarship, it will in time come to lie for turning out of Commons, and what a combustion will this raise then? The Riceties of Husband and Wife were said by the Judges in Scott's case to be proper for the Spiritual Court, and not fit to be brought before the Judges. Hales. That a Mandamus lies, I will not positively deny; but whether is it fit for us to proceed after this Return? It must be taken for granted, that it is not a Spiritual Corporation; if it were, you ought to Appeal to the Visitor, and then to the Delegates. It is a private Society, as an Inns of Court: and I confess, that Mandamus's do generally respect matters of publick concern. I never heard of a Mandamus for a Monk. If there be a Jurisdiction in the Visitor, and he hath determined the matter, how will you get over the Sentence? The Chancellor is Visitor of all the King's Free-Chappels, and the 2 H. 5. doth make him so of all Colledges of the Kings Foundation. Suppose a Temporal Court, over which we have Jurisdiction, do give Judgment in Assize to recover an Office: so long as that Judgment stands in force, do you think

1. w. 6.
2 Roll. 234.

think that we will grant a Mandamus to restore him against whom the Judgment is given? Twissden. In all Eleemosynary things there are Visitors appointed either by Law, or by Creation of the party. Hales. The Free Chappels of Windsor and Wolverhampton are not of Spiritual Jurisdiction. Hales. At this rate we should examine all Depositions, Suspensions, Elections, &c. and by the 13 of the Qu. the Laws of the University are confirmed. Hales. We ought not to grant a Mandamus where there is a Visitor: but in this case the Visitor hath given Sentence.

Mors & Sluce.

A Trial at Bar. An Action upon the case was brought against a Master of a Ship, who had taken in Goods to Transport them beyond Sea, for that he so negligently kept them, that they were stolen away whilst the Ship lay in the River of Thames. Maynard insisted upon it, that the Master was not chargeable: say they, he is chargeable whilst he is here, but when he is gone out of the Realm, he is not chargeable, though the Goods be taken from him, Which distinction, he said, had no foundation in Law. Hales. It will lye upon you that are for the Defendants, to shew a difference betwixt a Carrier and a Master of a Ship. And it will lye upon you that are for the Plaintiff, to shew why the Master of a Ship should be charged for a Robbery committed within the Realm, and not for a Piracy committed at Sea. It was urged for the Plaintiff, that a Poy-man and Ferry-man are bound to answer, and why not the Master of a Ship? The Defendant proved that there was no carelessness nor negligent default in him. Maynard. He is not chargeable, if there be no negligence in him, because he is but a Servant, the owner takes the Freight. Hales. He is Exercitor navis, If we should let loose the Master, the Merchant would not be secure. And if we should be too quick upon him, it might discourage all Masters: so that the consequence of this case is great. But the Jury gave a Verdict for the Defendant; the Court, for the reasons aforesaid, inclining that way.

(49.)

2 Keb. 866.

3 Keb. 72, 73.

135.

Molloy 209,

210.

1 Rol. 2. pl. 2.

1 Sid. 36.

Porter & Fry.

*J. l. Raym. 236.**2. Lev. 21.**1. Vent. 199.**2. Keb. 756. 707. 814. 3. Keb. 19. & 1. Freeman. 31.**J. l. when in the case (50.)**2 Keb. 814.**Here cited.**1 Cro. 583.**Co. Lit. 380.b.*

Ejectione firmæ, A special Verdict. The case was; A man deviseth to A. for life, the Remainder to one and the Heirs of his body, upon condition, That if he marry without consent of such and such, or dye without Heirs of the body of his Mother, that then the Estate shall go to another and his Heirs. He marries without their consent, and he in the Remainder enters. Mr. Attorney Finch. The first question will be, whether this Proviso be a Condition or a Limitation? 2. Whether notice be requisite in this case, or not? For the first, I take it to be a Limitation, and that it must so be expounded, and not as a Condition, Dyer, 10 Eliz. 317. Plowd. queres, 108. Moor. 312. 29 Eliz. Com. Banc. 1 Leon. Plac. 383. 2 Leon. 581. Poph. 6, 7. 1 Roll. Condition 411. and the same case is in Owen's Reports, 112. In case of a Devise, a Condition must be construed as a Limitation, 3 Cro. 388. There seems to be an Authority against me in Mary Portingtons case, 10 Co. in a reason there given; but it is an accumulative reason, and does not come to the point adjudged. I shall insist upon Wellock & Hamond's case in Leon. it is reported likewise in Boraston's case, 3 Co. and my Lord Coke says, that it doth resolve a Quære in Dyer, 327. so that expresse words of Condition, may by construction in a Will, amount to no more than a Limitation. The second point is, whether he shall be excused for breach of this Condition, for want of notice? First, I shall consider it in respect of the person. Secondly, In respect of the grounds of notice in any case. First, in respect of the person? now he may be considered in two capacities, as an Infant, and as a Devisee. Now his Infancy cannot excuse him: for the Condition was annexed to the Devise expressly, because he was an Infant. Secondly, He is a Purchaser. Now if an Infant purchase an Adowson, and the Incumbent dye, Laps shall incur, though he had notice of the death of the Incumbent: and there is the same reason in this case, where he is Devisee. Thirdly, An Infant is bound by all Conditions in Deed, though not by Conditions in Law. Com. 57. Indeed 31 Aff. 17. is against it; but in Bro.

Con-

Condition, Plac. 114. that Case is said to be no Law, and Bro. agreeth with Plowden 375. Secondly, Consider him as Devisee: and then there will be less ground to excuse the want of notice. I take it to be a good difference betwixt Lands devised to an Heir upon Condition, and Lands devised to a Stranger upon Condition. To the Heir notice must be given, but not to a Stranger: for the Heir is in by Descent, and a Title by Law cast upon him. And he may very well be supposed to take no notice of a Devise, because the Law takes no notice of a Devise to him. Now a Stranger, as he must needs take notice of the Estate given, so he may very well be obliged to take notice of the terms upon which it is given. 4 Co. 83. As for the grounds and reasons of the Law when notice in any case is requisite, and when not; first, I take it for a Rule, that every man is bound to take notice, when none is bound to give him notice: 1 H. 7. 5. 13 H. 7. 9. 5 Co. Sir Henry Constable's Case. 3 Leon. Burleigh's Case in the Exchequer. 1 Cro. 390. Rolls 856. Lit. Sect. 350. My second ground is, that where persons are equally privy and concerned, there needs no notice, Mich. 1649. Leviston's Case. 1 Leon. 31. 7 Co. 117. Mallories Case. 14 H. 7. 21. The third Consideration ariseth from the Circumstances, and strict formality of all notice. You must not give notice of a Will by word of mouth, but you must leave a Copy of it compared: 8 Co. Fraunces's Case. Now the Infant in Remainder is incapable of observing these circumstances; and they being both Strangers are both to take notice at their peril. Now to answer Objections; one is, that the Condition is penal, and makes a forfeiture of an Estate, and that therefore notice ought to be given. I say, this is rather a Declamation than an Argument in Law. I will put a Case, where he that is subject to a penalty, must give notice to preserve himself: Poph. 10. so that penalty or no penalty is not the business; but privacy or no privacy guides the Case. And Fraunces's Case, 8 Co. was ruled upon the privacy, not upon the penalty. 2 Cro. 56. and a Case adjudged in this Court betwixt Lec and Chamberlain seems against me; but they differ from ours; and 1 Cro. a Case between Alford and the Commonalty 1 Cro. 577.

nalty of London, is an Authority for me. My Solicitor North pro Defendence. I will not speak much to that point, whether it be a Condition or a Limitation. I shall relate for that upon Mary Portington's Case; that express words of Condition, cannot be construed to be a Limitation. Dyer 127. Now, if this be a Condition, then the Heir regularly ought to enter: which he cannot do in this Case, because a Remainder is here limited over. The Law does interpret Conditions according to the nature and circumstances of the thing, and not strictly always according to the Letter. I do not observe that in any case the Law suffers a man to incur a Forfeiture, where he hath not notice, or is not in the Law supposed to have notice. He cited 2 Cro. 144. Molineux & Molineux: and Fraunces's Case, 8 Report. He said it was not the intention of the Party, that the Devisee should be strip'd of his Estate, and he never the wiser. Saunders & Gerard's Case is for me, of which I have a private report. He urged also the Case of Curtis & Wolverton, Dyer 354. and Penant's Case, 4 Co. It is objected, that they that are to have the benefit of the Estate, ought to take notice: I answer, the same Objection might be made in Fraunces's Case. Another reason given to excuse the not-giving of notice, is, that the Condition imports no more than Nature teacheth; but I answer in case the Executor consent, it is no matter whether the Grandmother consent or not. And for their Authorities, I shall rely upon 1 Cro. 391. and upon Fraunces's Case for answering them. So he prayed Judgment for the Defendant. Hales. All the difference betwixt this Case and Fraunces's is, that in that Case there is an Heir at Law, and not in this. Now the Chancery is so just, as to observe the Civil and Canon Law, as to personal Legacies, but not as to Land. Post. 300.

Anonymus.

AN Action upon the Case, upon a Promise to pay Money three Months after, upon a Bill of Exchange. The Defendant pleads, non Assumpsit infra sex annos; urged, that as this Promise is laid, he ought to have pleaded, that the cause of Action did not accrue within six years. Symphon. Non Assumpsit infra sex annos, relates to the time of Payment, as well as to the Promise. Hales. That cannot be. Twidlen. If I Promise to do a thing upon request, and the Promise were made seven years ago, and the request yesterday, I cannot plead the Statute; but if the request was six years ago, it must be pleaded specially, viz. that causa actionis was above six years since. (51.)

Ante 71.

Bradcat & Tower.

AN Action was brought upon a Charter-party. And Hales (52.) in that Case said, that upon a Penalty you need not make a demand as in case of a nomine poenæ; as if I bind my self to pay 20 l. on such a day, and in default thereof to pay 40 l. the 40 l. must be paid without any demand. Hob. 82. 7 Co. 28. Hob. 208. 1 Sand. 33.

Hales. If a Man cut and carry away Corn at the same time, it is not Felony, because it is but one Act: but if he cut it, and lay it by, and carry it away afterwards, it is Felony. (35.) Trespass.

Hales. If a Declaration be general, Quare clausum fregit, and doth not express what Close, there the Defendant may mention the Trespass at another day, and put the Plaintiff to a New Assignment. But if he say, Quare clausum vocat Dale fregit, &c. there the conclusion, Quæ est eadem transgressio, will not help. (54.) Hob. 16.

Fitz-gerald & Maskal.

(55.)
4 Co. 87. a.

11. Co. 55.

Error of a Judgment in the Kings-Bench in Ireland: the general Error assigned. Offered, 1. That the Eject. was brought de quatuor molendinis, without expressing whether they were Wind-mills or Water-mills. Hales. That is well enough. The Presidents in the Register are so. Secondly, That it was of so many Acres Jampnor' & Bruer', not expressing how many of each. Cur'. That hath always been held good. It was then objected, that the Record was not removed: upon which it was ordered to stay.

(56.)
1. l. 2. Keil. 846.
ke 1. Term Rep.
397.

Ante 22.

+ the contrary
M. P. Rep. ten p.
Cha. 1. fol. 53.
h.

Pemberton moved for a Prohibition to the Spiritual Court, for that they cited the Minister of Mary-bone, which is a Donative, to take a Faculty of Preaching from the Bishop. Hales. If the Bishop go about to visit a Donative, this Court will grant a Prohibition. But if all the pretence be, that it is a Chappel, and the Chaplain hired, and the Bishop send to him, that he must not Preach without Licence, it may be otherwise. Twifden. Fitzherbert saith, If a Chaplain of the King's Free Chappel keep a Concubine, the Bishop shall not Visit, but the King. Hales. Indeed whether there be all Ornaments requisite for a Church, the Bishop shall not enquire, nor shall he punish for not repairing. Originally Free Chappels were Colleges, and some did belong to the King, and some to private Men. And in such a Chappel, he that was in, was entituled as Incumbent, and not a Stipendiary. To hear Counsel.

(57.)
Demise.
A. K. 2 Keb. 876.

Stile's Orig.
Reg. 587.

Moved by Stroud for a Prohibition to the Bishop's Court of Exeter, because they proceeded to the Probate of a Will, that contained Devises of Lands, as well as Bequests of personal things. Hales. Their proving the Will signifies nothing as to the Land. Stroud urged Denton's Case, and some other Authorities. Hales. The Will is intire, and we are not advised to grant a Prohibition in such case.

(58.)
Ireland.

Hales. It is the course of the Exchequer, in case of an Outlawry, to prefer an Information in the nature of a Trover and Conversion, against him that hath the Goods of the party Outlawed.
Parsons.

Parsons & Perns.

11. 1. Kent. 106. Pollexfen. A5. 2. Lev 3. A. 42. 2. 2. 1072. (59.)

TWO Women were Joyntenants in Fee. One of them made a Charter of Feoffment, and delivered the Deed to the Feoffee, and said to him, being within view of the Land, Go, enter, and take possession: but before any actual Entry by the Feoffee, the Feoffor and Feoffee intermarry. And the question was, whether or no this Marriage, coming between the delivery of the Deed and the Feoffers Entry, had destroyed the operation of the Livery within the view? Pollexfen. ^{4 Co. 68.} It hath not, for the power and authority that the Feoffee hath to enter, is coupled with an Interest, and not countermandable in fact, and if so, not in Law. If I grant one of my Horses in my Stable, nothing passeth till Election, and yet the Grant is not revocable: so till attornment nothing passeth, and yet the Deed is not revocable. If the Woman in our Case, had married a Stranger, that would not have been a Revocation, Perk. 29. I shall compare it to the Case of 1 Cro. 284. Burder *versus* --- Now for the interest gotten by the Husband by the Marriage, he hath no Estate in his own right. If a Man be seized in the right of his Wife, and the Wife be attainted of Felony, the Lord shall enter and oust the Husband; he gains nothing but a bare perception of profits till Issue had: after Issue had, he has an Estate for Life. Where a man that hath title to enter comes into possession, the Law doth execute the Estate to him: 7 H. 7. 4. 2 R. 2. tit. Attornment. 28 Ed. 3. 11. Bro. tit. Feoffment, 57. Moor, f. 85. 3 Cro. 370. Hales said to the other side, you will never get over the Case of 38 E. 3. My Lord Coke to that Case saith, that the Marriage without Attornment is an Execution of the Grant: but that I do not believe; for the attendance of the Tenant shall not be altered without his consent. The effectual part of the Feoffment is, Go enter, and take possession. Twifden. Suppose there be two Women seized, one of one Acre, and another of another Acre, and they make an Exchange: and then one of them marries before Entry, shall that defeat the Exchange? Hales. That is the same Case. So Judgment was given accordingly.

Co. Lit. 351. a.

Zouch & Clare.

(60.)
2 Keb. 881.

Thomas, Tenant for Life, the remainder to his first, second and third Son, the Remainder to William for Life, and then to his first, second and third Son: and the like Remainders to Paul, Francis and Edward, with Remainders to the first, second and third Son of every one of them. William, Paul, Francis and Edward levy a Fine to Thomas, Paul having issue two Sons at the time. Then Thomas made a Feoffment. And it was urged by Mr. Leak, that the Remainders were hereby destroyed. Hales. Suppose A. be Tenant for Life, the Remainder to B. for Life, the Remainder to C. for Life, the Remainder to a Contingent, and A. and B. do join in a Fine, doth not C's. right of Entry preserve the Contingent Estates? if there had been in this Case no Son born, the contingent Remainders had been destroyed; but there being a Son born, it left him in a right of Entry which supports the Remainders: and if we should question that, we should question all, for that is the very basis of all Conveyances at this day. And Judgment was given accordingly.

Term. Pasch. 24 Car. II. 1672. in B. R.

Monke *versus* Morris & Clayton.

3 K. 66. 1. 17.

An Action was brought by Monke against the Defendants, and Judgment, was given for him. They brought a Writ of Error, and the Judgment was affirmed. Jones moved that the Writ might be brought into Court, the Plaintiff being become a Bankrupt. ^(1.)
 13 Eliz. 7 Ex.
 24. N. 7.
 1 Cro. 166.
 176.
 Winnington. This Case was adjudged in the Common-Pleas; viz. a Man brought an Action of Debt upon a Bond, and had a Verdict, and before the day in Bank, became a Bankrupt: it was moved, that that Debt was assigned over, and prayed to have the Writ brought into Court, but the Court refused it. Coleman. We have the very words for us in effect: for now it is all one as if Judgment had been given for the Assignees of the Commissioners. Twifden. How can we take notice that he is a Bankrupt? any Execution may be stopped at that rate, by alledging, that there is a Commission of Bankrupts out against the Plaintiff. If he be a Bankrupt, you must take out a special Scire facias, and try the matter, whether he be a Bankrupt or not. Which Jones said they would do, and the Court granted.

Twifden. If a Mariner or Ship-Carpenter run away, he loses his wages due: which Hales granted.

(2.)
 Admiral.

Henry

Henry Lord Peterborough *versus* John
Lord Mordant.

- (3.) **A** Trial at Bar upon an Issue out of Chancery, whether Henry Lord Peterborough had only an Estate for Life, or was seized in Fee-tail. The Lord Peterborough's Counsel alledged, that there was a Settlement made by his Father, 9 Car. I. whereby he had an Estate in Tail, which he never understood till within these three years: but he had claimed hitherto under a Settlement made 16 Car. I. And to prove a Settlement made 9 Car. I. he produced a Witness, who said, that he being to purchase an Estate from my Lord the Father, one M. Nicholls, who was then of Counsel to my Lord, gave him a Copy of such a Deed, to shew what Title my Lord had. But being asked whether he did see the very Deed, and compare it with that Copy? he answered in the Negative: whereupon the Court would not allow his Testimony to be a sufficient Evidence of the Deed: and so the Verdict was for my Lord Mordant. *Infra* 114. pl. 13.

Cole & Forth.

- (4.) **A** Trial at Bar directed out of Chancery upon this Issue, whether Waste or no Waste? Hales. By protestation I try this Cause, remembering the Statute of 4 Hen. 4. And the Statute was read, whereby it is Enacted, That no Judgment given in any of the King's Courts, should be called in question, till it were reversed by Writ of Error or Attaint. He said this Cause had been tryed in London, and in a Writ of Error in Parliament the Judgment affirmed; Now they go into the Chancery, and we must try the Cause over again, and the same Point. A Lease was made by Hilliard to Green in the year 1651. Afterwards he deviseth the Reversion to Cole; and Forth gets an under-Lease from Green of the Premises, being a Brew-house. Forth pulls it down, and builds the Ground into Tenements. Hales. The question is, whether this be Waste or no? and if it be Waste at law, it is so in Equity. To pull down a House is Waste, but
- 3 Keb. 8.
- Ante 61.
- 2 Sand. 252.

but if the Tenant build it up again before an Action brought, he may plead that specially. Twisden. I think the Books are pro and con: whether the building of a new House be Waste or not. Hales. If you pull down a Salt Mill and build a Corn Mill, that is Waste: Then the Counsel urged, that it could not be repaired without pulling it down. Twisden. That should have been pleaded specially. Hales. I hope the Chancery will not repeal an Act of Parliament. Waste in the House is Waste in the Curtelage, and Waste in the Hall is Waste in the whole House. So the Jury gave a Verdict for the Plaintiff, and gave him 120 l. Damages.

Co. Lit. 53. a.
1 Roll. 507.
2 Roll. 815.
pl. 22.

Term. Mich. 25 Car. II. 1673. in B. R.

(1.)

An Action of Debt was brought upon a Bond in an Inferiour Court; the Defendant cognovit actionem, & petit quod inquiretur per patriam de debito. This Pleading came in question in the Kings Bench upon a Writ of Error: but was maintain'd by the Custom of the Place, where, &c. Hales said it was a good Custom: for perhaps the Defendant has paid all the Debt but 10 l. and this course prevents a Suit in Chancery. And it were well if it were established by Act of Parliament at the Common Law. Wild. That Custom is at Bristow.

Randal *versus* Jenkins.

24 Car. 2. Rot. 311.

(2.)
Inf. 112. pl. 7.

Replevin. The Defendant made Conuſance as Bayliſſ to William Jenkins for a Rent-charge, granted out of Gavel-Kind Lands, to a Man and his Heirs. The question was, whether this Rent ſhould go to the Heir at Common Law, or ſhould be partible amongſt all the Sons. Hardres. It ſhall go to the eldeſt Son, as Heir at Law; for I conceive it is by reaſon of a Custom time out of mind uſed, that Lands in Kent are partible amongſt the Heirs. Lamb. Perambular. of Kent 543. Now this being a thing newly created, it wants length of time to make it deſcendible by Custom. 9 H. 7. 24. A Feoffment in fee is made of Gavel-kind Lands upon Condition: the Condition ſhall go to the Heirs at Common Law, and not according to the deſcent of the Land. Co. Litt. 376. If a Warranty be annex'd to ſuch Lands, it ſhall deſcend only upon the eldeſt Son. Now this Rent-charge, being a thing
con.

contrary to common right, and de novo created, is not apportionable : Litt. Sect. 222, 224. it is not a part of the Land, for if a man levy a fine of the Land, it will not extinguish his Rent, unless by agreement betwixt the parties : 4 Edw. 3. 32 Bro. tit. Customs 58. if there be a Custom in a particular place, concerning Dower, it will not extend to a Rent-charge : Fitz. Dower 58. Co. Litt. 12. Fitz. Avowry 207. 5 Edw. 4. 7. there is no occasion in this case, to make the Rent descendible to all : for the Land remains partible amongst the Heirs, according to the Custom. And why a Rent should go so, to the prejudice of the Heir, I know not. 14 H. 8. 8. it is said, that a Rent is a different and distinct thing from the Land. Then the language of the Law speaks for general Heirs, who shall not be disinherited by construction. The grand Objection is, whether the Rent shall not follow the nature of the Land? 27 H. 8. 4. Fitzherb. said, he knew four Authorities that it should : Fitz. Avowry 150. As for his first case, I say, that Rent amongst Parceners is of another nature than this : for that is distreynable of Common right. As for the second, I say the rule of it holds only in cases of Proceedings and Trials ; which is not applicable to his Custom. His third case is, that if two Coparceners make a feoffment, rendering Rent, and one dies, the Rent shall not survive. (To this I find no answer given) Litt. Co. Lit. 111. Sect. 585. is further objected ; where it is said that if Land be devisable by Custom, a Rent out of such Lands may be devised by the same Custom : but Authorities clash in this point. He cited farther these books ; viz. Lamb. Peramb. of Kent, and 14 H. 8. 7, 8. 21 H. 6. 11 Noy, Randall & Roberts case 51. Den cont. I conceive this Rent shall descend to all the Brothers : for it is of the quality of the Land, and part of the Land : it is contained in the bowels of the Land, and is of the same nature with it : 22 Aff. 78 which I take to be a direct Authority as well as an instance. Co. Lit. 132. ibid. 111. In some Boroughs a man might have devised his Land by Custom, and in those places he might have devised a Rent out of it. The Stat. de donis conditionalibus brought in a new Estate of Inheritance by way of entail : now this Estate Tail in Gavelkind Lands hath been taken to descend to all the Brothers ; and the reason is, because it is part of the Fee-simple, though created de novo : so Uses follow the nature of the Land. The cases that have been cited, were not

not the Opinion of the Court, but of them that argued. Lamb. 47. saith, that the Custom extends to Abbots, Commons, Rent-charges, as well as to Land. It is objected, that here must be a prescription: I answer Gavel-kind Law is the Law of Kent, and is never pleaded but presumed. 7 Edw. 3. 38. Co. Litt. 175. 2 Edw. 4. 18. & Co. Litt. 140. saith, the Customs of Kent are of common right, and if so, then our Rent-charge will go of common right to all the Brothers. Hales, Rainsford and Wyld were of Opinion, that the Rent ought to descend to all the Brothers, according to the descent of the Land: because the Rent is part of the profits of the Land, and issues out of the Land; and they gave Judgment accordingly.

Post. 112.

(3.)
Remainder.
Post. 121, 159.
27 H. 8. c. 10.
Infr. 121. pl. 72
Co. Litt. 22.

1 Co. 13. b.

A man covenanted to stand seized to the use of the Heirs of his body. Hales. The Heir and the Ancestor are correlates, and as one thing in the eye of the Law, and that is the reason why a man shall not make his right Heir a Purchaser, without putting the whole fee-simple out of himself. If the Fathers Estate turns to an Estate for life, there will be no question. In the case of Bennet & Mitford, there did result an Estate for life, to knit the Limitation to the original Estate. Here, 1. We are in the case of an Estate Tail; and the Judges use to go far in making such a Limitation good; then, 2. We are in the case of an Use, which is construed as favourably as may be to comply with the intention of the party. This case is not as if he should have covenanted to stand seized to the use of the Heirs of the body of J. D. there the Covenantor would have had a Fee-simple in the mean time: but the case is all one as if the Limitation had been to himself, and the Heirs of his own body: Vide the Earl of Bedford's case. Twissden. We must make it good, if we can. Cur' advisare vult.

Austin & Lippencott.

A Special Verdict. Francis the Father was Tenant for (4.)
 life, the Remainder in fee to Francis the Son; and by 3 Keb. 243.
 the Deed, by which this Estate was thus settled, 100 l. a year
 was appointed to be paid to Francis the Son during the Fa-
 ther's life. The Son releaseth to the Father all arrears of
 Rent, Annuities, Titles and Demands by virtue of that In-
 denture: and the question was, whether this Release passed
 the Inheritance as well as the Annuity? Polyxsen. I con-
 ceive this Release shall not pass any Estate in the Land: and
 my reason is, because there is no mention of the Land, nor
 of any Estate therein. The principal thing intended and ex-
 pressed is the Annuity: then the Release concludes, to the day
 of the Release, which doth manifest, that he did not intend to
 Release any thing that was not to come to him till after the
 death of his Father. It is true, here is the word demand,
 but that will not do it: 3 Cro. 258. Then for the word Titles:
 by Plowd. 494. and 8 Co. 153. it is where a man hath law-
 ful cause to have that that another doth possess; sometimes it
 is taken in a larger sense, and then it doth include right.
 Upon construction of this Release I think it ought to be taken
 in the stricter sense, and the intention of the party must guide
 the construction. For where there are general words in the
 beginning, and particular words afterwards, the particular 8 Co. 154. b.
 do restrain the general: and so vice versa for enlargement: he
 cited Hen & Hanson's case, 15 Car. 2. in this Court: where a
 Release of all demands would not Release a Rent-charge by the 2 Cro. 486.
 Opinion of three Judges against Twifden, for that reason; and
 because words in Deeds are to be taken according to common
 acceptation, he cited 2 Rolls 409. In our case, the general
 words of all Suits and Titles are limited and restrained to
 the Annuity and Title of that, and shall not by a large con-
 struction be extended to any thing else. Hales. How hath the
 Inheritance gone? Polyxsen. The Grandchild has that.
 Hales. I think a Release of all demands will not extinguish a
 Rent: but if it were all demands out of Land, it were ano- Co. Lit. 291. b.
 ther thing. It hath been held over and over again, that it
 does not extinguish and discharge a Covenant not broken.
 But what say you to this Release of all Titles? for it appears

in exprefs terms, that the Son did not only releafe the arrears of the Annuity, but the thing it felf; and not only fo, but all other Titles by virtue of that Deed: fuppofe the cafe had been but thus; the Father is Tenant for life, the Remainder to the Son for life; the Son releafeth to his Father all the Title that he has by virtue of that Deed: had not this paffed the Son's Estate for life? In the cafes that you have cited, it is allowed that a Releafe of all Titles, will pafs a right to Land. He had a Title to the Annuity, and a title to the Remainder: now he releafeth the Annuity, and all other Titles which he hath by that Deed, or otherwife howfoever: To hear Serjeant Maynard on the other fide.

Wilson & Robinson.

1 L. 2. Lev. 91. 3. Kibb. 100

(5.)
3 Keb. 180.

1 Rol. 834.
pl. 14.

Styl. 281, 293.

2 Cro. 290.

A Man deviseth all his Tenant-right Estate at Brickend, and all that my Father and I took of Rowland Hobbs, &c. Levins. I conceive that thefe words pafs only an Estate for life; for it is not mentioned what Estate he hath: 1 Cro. 447, 449. a Devife of all the reft of his Goods, Chattels, Leases, Estates, Mortgages, Debts, ready money, &c. and the Court held, that no Fee paffed, and laid it was a doubt, whether any Estate would pafs in that cafe, but what was for years; being coupled only with personal things. Trin. 1649 Rot. 153. Jerman & Johnson: One devised all his Estate, paying his Debts and Legacies; now his personal Estate came but to 20 l. and his Debts were 100 l. there indeed all his real Estate paffed because of the payment of his Debts. And in our cafe, the following particulars are but a description of the Land, and contain no limitation of the Estate. If a man deviseth black Acre to one and the Heirs of his body, and alfo deviseth white Acre to the fame person, he hath but an Estate for life in white Acre, though he hath a Fee-simple in the other: for the word alfo is not fo ftrong as if it had been in the fame manner. Moor 152. Yel. 209. Weston contra. I conceive an Estate of Inheritance doth pafs; for the word Estate comprehendeth all his Interest. When a man deviseth all his Estate, he leaves nothing.

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in himself : in that case of Jerman it was held, that all my Estate, comprehends all my Title and Interest in the Land. If a man deviseth all his Inheritance, this carries the Fee-simple of his Land : and the word, all his Estate, is as comprehensive as that. Hales & Wyld. By a Grant or Release of totum statum suum, the Fee-simple will pass : if the words had been all my Tenant-right Lands, it had been otherwise : but the word Estate is more than so : if a man deviseth all his Copy-hold Estate, will not all his whole Interest pass ? Adjournatur.

Norman & Foster.

AN Action of Debt upon a Bond to perform Covenants in an Indenture of Lease, one Covenant is for quiet enjoyment : and the Plaintiff assigns for breach, that a Stranger entred, but does not say that he had Title. Hales. Habens Titulum at that time, would have done your business. By Lord Dyer's case is, that another entred claiming an Interest : but that is not enough ; for he may claim under the Lessee himself. He mentioned the cases in Moor 861. & Hob. 34. Tisdale & Essex. If the Covenant had been to save him harmless against all lawful and unlawful Titles, yet it must appear, that he that entred, did not claim under the Lessee himself. Hales. If I Covenant that I have a lawful right to grant, and that you shall enjoy notwithstanding any claiming under me ; these are two several Covenants, and the first is general, and not qualified by the second. And so said Wyld : and that one Covenant went to the Title, and the other to the possession : Dyer, 328. An Assumpsit to enjoy sine interruptione alicujus, that is, whether by Title or by Tort, a quiet possession being to be intended to be the chief cause of the Contract. 3 Leon. 43. 2 Cro. 425, 315, 444. Adjournatur.

(6.)

Ante 66.
2 Cr. 319.
Post. 290.
4 Co. 82. b.

1 Sand. 60.

(7.)
Pardon.]

Angell convicted of Barretry, produced a Pardon, which was of all Treasons, Murders, Felonies, and all Penalties, Forfeitures and Offences. The Court said the words all Offences, will pardon all that is not capital.

Blackburn & Graves.

(8.)
3 Keb. 263.
4 Co. 22. b. 23.

1 Rol. 505. Y. 1
Z. 2.

4 Co. 22. b.

A Copy-holder surrenders to the use of several persons for years successive, the Remainder in Fee to J. S. Wyld. An admittance of a particular Tenant is an admittance of all the Remainders to all purposes, but only the Lords Fine: and if the Custom be, that the Fine paid by the first Tenant shall go to all the Remainders, then the admittance of the first man is to all intents and purposes an admittance of all that come after. In this case the possession of the Lessee for years is the possession of the Remainder-man. In one Baker & Dereham's case, there was a surrender to the use of a man and his heirs of Copyhold Land, that descended according to the Custom of Borough-English: the surrenderee dyed before admittance; and the Opinion of the Court was, that the right would descend to the youngest, according to the Custom.

(9.)
Tenants in
Common.
Co. Lit. 198. a.
Co. Lit. 202. a.

Upon a case moved, Hales said, That if a Tenant in Common bring a personal Action without his fellow joyning in the Suit, the Defendant ought to take advantage of it in abatement: but if he plead Not-guilty it shall be good; but then he shall recover damages only for a moiety. If a Tenant in Common seal a Lease of Ejectment, he shall recover but a moiety.

(10.)
Certiorari.

A Justice of Peace committed a Brewer for not paying the duty of Excise; the Brewer was brought into Court by Habeas Corpus. Sympson. It ought to appear that he was

was a common Brever. Hales. The Statute doth prohib^{12 Car. 2. c. 23.}
bit the byinging of a Certiorari, but not a Habeas Corpus. §. 36. N. 1.
And want of averment of a matter of fact, may be amend-
ed in a Return in Court: and if it be not true, at their
peril be it. So it was mended.

Money owing upon a Judgment given in the King's Court
cannot be attached.

(II.)
Foreign At-
tachment.

3 Cro. 63. 1 Rolls 552.

Term. Hill 25 & 26 Car. II. 1673. in B. R.

Baker & Bulstrode.

(12.)
3 Keb. 273.

2 Cro. 661.

5 Co. 23. b.

DEbt upon a Bond. The Condition was, to Seal and execute a Release to the Plaintiff. The Defendant demurs, because the Plaintiff did not alledge in his Declaration a tender of a Release. It was urged, that the Condition was not, to make, but only to Seal and Execute, &c. But per Curiam, he is bound to do it without a tender. And the word Execute, of the word Seal, comprehends the making. And Lamb's case was cited.

Warren & Prideaux.

Trin. 24 Car. 2. Rot. 1472.

(13.)
3 Keb. 249.
Raym. 232.

A Distress and Abowry for Toll. The prescription was for Toll, in consideration of maintaining the Key, and keeping a Bushel to measure Salt; viz. That in consideration thereof he and those, &c. have had time out of mind, &c. a Bushell of Salt of every Ship that comes laden with Salt into Slipper-point: For the Abowant it was alledged, that the maintaining of the Key is for publick good: Co. Magn. Cart. 222. Rolls 265. Its true, it is not alledged, that they did actually use the Weights and Measures, 1 Leon. 231. but it being alledged that the Ship came within Slipper-point, it is enough to charge the Plaintiff with the payment. As for the Distress taken, which is part of the Ship's lading, viz. Salt; it is objected, that it cannot be distrained, because it is part of

of the thing from which the duty ariseth : but I answer, that this is not like to a Distress upon Land, nor to be judged of according to the rules allowed in cases of such Distresses. There were cited on this side 21 H. 7. 1. 3 Cro. 710. Smith & Shephard : Dyer 352. Courtney contra. I conceive this ^{Ante 48.} prescription ought to have some consideration, and to be grounded on a meritorious cause, to bind a Subject. The keeping of the Bushell is no meritorious cause, because it is presumed, that the party hath the use of it himself. Hales. The prescription is not for a Port, but a Wharf. If any man will prescribe for a Toll upon the Sea, he must alledge a good consideration : because by Magna Charta, and other Statutes, every one hath liberty to go and come upon the Sea without impediment. Wyld. * This Custom or Prescription is laid, to have a Bushell of Salt of every Ship that comes within the Slipper-point ; if a Ship be driven in by stress of weather, and goes out again the first opportunity that presents, shall that Ship pay ? Hales. If he had said, that he had a Port, and was bound to maintain that Port, and that he and all those whose Estate he had, &c. that might have been a good Prescription ; but in this case there must be a special inducement and compensation to the Subject by reason of those Statutes by which all Merchants and others, have liberty to come in and go out. They inclin'd that the Prescription was not good. ^{2 Roll. 205. E. 5.}

Aonymus.

A Trial at Bar concerning the River of Wall-fleet ; the ^(14.) question was, whether ^{3 Keb. 242.} had not the right of fishing there, exclusive of all others. Hales. In case of a private River, the Lord's having the Soil is a good evidence to prove that he hath the right of fishing ; and it puts the proof upon them that claim liberam piscariam. But in case of a River that flows and re-flows, and is an Arm of the Sea, there prima facie it is common to all ; and if any will appropriate a privilege to himself, the proof lyeth on his side ; for in case of an Action of Trespass brought for fishing there, it is prima facie a good justification to say, that the locus in quo is brachium maris, in quo unusquisque subjectus Domini Regis ^p ^{habet}

habet & habere debet liberampiscariam. In the Severne there are particular restraints, as Gurgites, &c. but the Soil doth belong to the Loyds on either side : and a special sort of fishing belongs to them likewise ; but the common sort of fishing is common to all. The Soil of the River of Thames is in the King : and the Lord Mayor is Conservator of the River ; and it is common to all Fisher-men : and therefore there is no such contradiction betwixt the Soil being in one, and yet the River common for all Fishers, &c.

Sedgewick & Goston.

J. l. 2. Lev. 93. 3. Feb. 25.

(15.)
J. l. 3. Keb. 256.

2. Feb. 93.

HAles said, That a Writ of Error in Parliament may be returned ad prox. Parliament. such a day ; but if a particular day be not mentioned, then it is naught ; and although there be a particular day expressed, yet if that day be at two or three Terms distance, the Court will adjudge it to be for delay ; and it shall be no Superfedeas. And he said he had looked into the Books upon the point. In the Register he said, there is a Scire fac. ad prox. Parliament. but not a Writ of Error.

Term. Pasch. 26 Car. II. 1674. in B. R.

Fountain & Coke.

S. C. 2. Keb. 203. 309. 2. Rev. 126.

A Trial at Bar. Hales. An Executor may be a witness in a cause concerning the Estate, if he have not the Surplusage given him by the Will: and so I have known it adjudged. If a Lessee for years be made Tenant to the Praecipe for suffering a common Recove-
ry; that doth not extinguish his term, because it was in him for another purpose: which the whole Court agreed. (1.)

*7 Co. 38. a.
2 Cro. 643.*

Jacob Aboab.

Debt upon a Bond was brought against him by the name of Jacob: and he pleaded, that he was called and known by the name of Jaacob, and not Jacob: but it was over-ruled. (2.)

*3 Keb. 287.
3 Keb. 284.
Co. Lit. 3. a.*

Sir John Thorowgood's Case.

It was moved to quash an Indictment, because it ran in detrimentum omnium inhabitantium, &c. 2 Rolls 83. pl. 11. Wyld. I have known it ruled naught for that cause. So quashed. (3.)

Benson *versus* Hodson

(4.)
3 Keb. 274,
287, 292.

2. / v. 28.
A Writ of Error of a Judgment in the County Palatine of Lancaster in Replevin : The Defendant makes Co-
nufance as Bayliff to Ann Mosely : The Lands were the
Lands of Rowland Mosely, and he covenanted to leby a Fine of
them, to the use of himself and the Heirs males of his body, the
remainder in Tail to several others, the remainder to his own
right Heirs. Provided, that if there shall be a failer of Issue
Male of his body, and Dame Elizabeth be dead, and Ann
Mosely be married, or of the age of 21 years, then she shall
have 200l. per annum for ten years : Then Rowland dies,
leaving Issue Sir Edward Mosely, Sir Edward makes a Lease
for 1000 years ; then levies a Fine, and suffers a Recovery ;
Then dies without Issue Male : And the Contingents did all
happen. The question is, whether this Rent-charge of 200l.
per annum be barred by the Fine and Recovery, and shall not
operate upon the Lease ? Levins. I conceive the Fine is not
well pleaded, for nothing is said of the King's Silver, and if
that be not paid, it is void : Then they have pleaded a Com-
mon Recovery, but not the Execution of it by Entry. Now
I conceive the Common Recovery doth destroy the Estate
Tail, but not the Rent. The reason why a common Reco-
very is a Bar, is because of the intended recompence. Now
that is a fictitious thing : 9 Rep. Beamonts case. 1 Cro. Stone
and Newman, Cuppledick's case. Now this Rent is a meer
possibility, and hath no relation to the Estate of the Land.
Then again, when the Recovery was suffered, the Rent was
not in being : Now a Recovery will never bar but where the
Estate is dependant upon it, either in Reversion or Remain-
der. For that case of Moor pl. 201. I conceive he is barred,
because the Reversion is barred by the Fine. 3 Cro. 727, 792.
White and Gerishe's case, the same case 2 And. 190. Noy p. 9.
Another reason is, because the Rent remains in the same
plight, notwithstanding the Fine. Another reason is, it was
a meer possibility at the time of the Fine and Recovery. Pell
and Brown's case is for me. In our case is no Estate in esse
to be barred. Then this Estate is granted out of the Estate
of the feoffers, As in Whitlock's case 8 Rep. 71. the Estates
for years, which there is a power to make, shall be said to
precede

1 Sid. 102.

precede all the Limitations. There is no other way for securing younger Childrens Portions by the same Deed, but it may be done by another Deed, as in Goodyer and Clarkes case. Mr. Finch contra. I conceive the Rent is barred upon the reason of Capell's case. They say not. (1) Because it doth only charge the Remainder. (2) The intended recompence doth not go to it. (3) This Lease for 1000 years doth precede the Fine. The Law will never invert the operation of a Conveyance, but ut res magis valeat, Bredon's case. Then for the intended recompence, that cannot be the reason of barring a Remainder, for the Estate Tail was barred before, 3 Leon. 157. But Moor fol. 73 saith, it is the favour the Law hath for Recoveries. And till the Reversion takes place in possession, the Rent cannot arise out of the Reversion, nor so long as this Lease is in being. Hales. You make two great points, (1) Whether the Rent be barred by the Common Recovery? (2) Whether the Rent charge shall arise out of the Lease for years? This is plain; if Tenant in Tail grant a Rent-charge, and suffer a Common Recovery, the Rent-charge will not be avoided; So that if Tenant be, rendering a Rent, a Recovery will not bar that, though it doth a Reversion; 1 Cro. 598. but the reason of these cases is, because the Estate of him that suffers the Recovery, is charged with the Rent. Therefore if there be a Limitation of a Use upon Condition, and Cestui que use suffers a Recovery that will not destroy the Condition, the Estate being charged with it, for the Recoveror can have the Estate only as he that suffered the Recovery had it; And therefore there is an Act of Parliament to enable Recoverors to distress without Attornment. Therefore so long as any one comes in by that Recovery, he comes in in continuance of the Estate Tail, and coming in so, he is liable to all the charges of Tenant in Tail. Now what is the reason why Tenant in Tail, suffering a Common Recovery, a Rent by him in Remainder shall be barred? The reason is, because the Recoveror comes in in the continuance of that Estate that is not subject to the Rent, but is above all those charges; now no recompence can come to such a Rent. And therefore there is another reason why a Common Recovery will bar; at Common Law upon an Estate Tail, which was a Fe-simple conditional, a Remainder could not be limited over; because but a possibility: but now comes that Statute De donis conditionalibus, and makes it

it an estate tail, and a Common recovery is an inherent privilege in the Estate that was never taken away by that Statute De donis, the Law takes it as a conveyance excepted out of the Statute, as if he were absolutely seised in fee, and this is by construction of Law; It is true, there can be no recompence to him that hath but a possibility. But the business of recompence is not material, as to this charge; And the reason of White's case and other cases put explain this. Now what difference between this and Capel's case? Say they, there the charge doth arise subsequent, but here the charge doth arise precedent: Why I say the charge doth arise precedent to the Remainder, but subsequent to the Estate tail, for it is not to take effect till the Estate tail be determined. It was doubted in the Queens time, whether a Remainder for years was barred, but it hath been otherwise practised ever since, and there is no colour against it. Now you do agree that the Remainder to the right Heirs of one living shall be barred, for the Estate is certain though the Person be uncertain; So long as the Rent doth not come within the compass and limitation of the Estate tail the Rent is extinct and killed, there is nothing to keep life in it: But whether doth not the Lease for years preserve it? Heretofore it was a question among young men, Whether if Tenant in Tail granted a Rent Charge for Life, then makes a Lease for three Lives; In this case though the Rent before would have dyed with Tenant in Tail, yet this Rent will continue now during the three Lives, which it will. And it hath been questioned, if he had made a Lease for years instead of the Lease for lives if that would have supported the Rent? Now in our case if the Lease for years were chargeable the Rent would arise out of that; But if this Rent should continue then most mens Estates in England would be shaken. Wild. The Lease for years doth not preserve the Rent, but the Common Recovery doth bar it: For Pell & Brownes case: in that Case the Recovery could not bar the possibility, for he was not Tenant in Tail that did suffer the Recovery, but he had only a Fee simple determinable, and the contingent Remainder did not depend upon an Estate Tail, nay did not depend by way of Remainder, but by way of Contingency; It is true, Justice Dodridge did hold otherwise, but the rest of Judges gave Judgment against him upon very good reason

Twifden.

Twifden. I never heard that case cited, but it was grumbled at. Hales. But to your knowledge and mine, they always gave Judgment accordingly. A man made a gift in Tail determinable upon his non-payment of 1000 l. the Remainder over in Tail to B. with other Remainders, Tenant in Tail before the day of payment of the 1000 l. suffers a common Recovery, and doth not pay the 1000 l. yet because he was Tenant in Tail when he suffered the Recovery, by that he had barred all, and had an Estate in Fee by that Recovery. At a day after Hales said, the Rent was granted before the Lease for years, and is not to take effect till the Estate Tail be spent, and a common Recovery bars it: If there be Tenant in Tail, reserving Rent, a common Recovery will not bar it; so if a Condition be for payment of Rent, it will not bar it: But if a Condition be for doing a collateral thing, it is a bar. And so if Tenant in Tail be with a Limitation so long as such a Tree shall stand, a common Recovery will bar that Limitation.

Lampiere *versus* Mereday.

AN Audita Querela was brought before Judgment entered, which they could not do: 9 H. 5. 1. which the Court agreed; Whereupon Counsel said, it was impossible for them to bring an Audita Querela before they were taken in Execution; for the Plaintiff will get Judgment signed, and take out Execution on a suddain, and behind the Defendants back. Thereupon the Court ordered the Postea to be brought in, for the Defendant to see if Execution were signed. And at a day after Hales said, If an Audita Querela was brought after the day in bank, though the Judgment was not entered up, yet the Court would make them enter up the Judgment, as of that day, So that they shall not plead Nul tiel Record. (5.)

Wyld said, a Sheriffs bond for ease and labour was void at Common Law, and so it was declared in Sir John Lenethal's case. (6.)
 Sheriffs.
 10 Co. 100.
 Hob. 14.

(7.)
Supr. 96. pl. 2.
Ante 96, 97.

Twisden upon opening of a Record by Mr. Den said, It was already adjudged in this Court, that a Rent issuing out of Gavelkind Land, is of the nature of the Land, and shall descend as the Land doth.

(8.)
1 Rol. 442.

An Action of Debt upon a Bond. Symphon moved in Arrest of Judgment. The Bond was dated in March, and the Condition was for payment, super vicessimum octavum diem Martii prox' sequentem. It was sequentem which refers to the day which shall be understood of the same month. If it had been sequentis, then it had referred to March, and the nit had been payable the next year. But the Court was of Opinion, that it should be understood the currant month. Symphon cited a case wherein he said it had been so held. Read *versus* Abington.

(9.)
3 Keb. 308.

Hales. Formerly, if Execution was gone before a Writ of Error delivered or shewed to the party, it was not to be a Superfedeas. Wyld. He must not keep the Writ in his pocket, and think that will serve. At another day Hales said, it shall not be a Superfedeas, unless shewed to the party, and he must not forego his time of having it allowed; for if it be not allowed by the Court within four days, it is no Superfedeas. Hales. A Writ of Error taken out, if it be not shewn to the Clerk of the other side, nor allowed by the Court, it is no Superfedeas to the Execution: And that if a Writ of Error be sued bearing Teste before the Judgment be given, if the Judgment be given before the Return, it is good to remove it, (though at first he said it was so in respect of a Certiorari, but not of a Writ of Error.) And he said that Judgment, when ever it is entred, hath relation to the day in bank, viz the first day of the Term: So that a Writ of Error returnable after, will remove the Record when ever the Judgment is entred.

(10.)
3 Keb. 301.
22 H. 8. c. 5.

Upon a motion concerning the amending of Leather Lane. Hales. If you plead Not-guilty, it goes to the Repair or not Repair; but if you will discharge your self, you must do it by prescription, or *ratione tenuræ*, and say that such an one *ratione tenuræ*, or such part of the Parish, hath always used time out of mind, &c.

Anony-

Anonymus.

An Action of Debt upon a Bond: the Condition, Where-
 as one Bardue did give by his Will so much, if he should
 pay it such a day, &c. The Defendant pleads bene & verum
 est, he did give him so much by his Will and Testament;
 but he revoked that, and made another last Will. The
 Court said, he was estopped to plead so. Hales. It doth not
 appear when the Bond was made, and it shall be intended
 to be made after the parties death. Judgment pro Que-
 rente.

(11.)
Demise.Moor 420.
Ante 15.
1 Rol. 872.
pl. 8.Deereing *versus* Farrington.

An Action of Covenant, declaring upon a Deed by which
 the Defendant assignavit & transposuit all the money
 that should be allowed by any Order of a Foreign State to
 come to him in lieu of his share in a Ship. Tompson moved
 that an Action of Covenant would not lye, for it was neither
 an expresse nor implied Covenant: 1 Leon. 179. Hales. You
 should rather have applyed your self to this; viz. whether it
 would not be a good Covenant against the party, as, If a
 man doth demise, that is an implied Covenant; but if there
 be a particular expresse Covenant, that he shall quietly enjoy
 against all claiming under him, that restrains the general im-
 plied Covenant; But it is a good Covenant against the
 party himself. If I will make a Lease for years, reserving
 Rent to a Stranger, an Action of Covenant will lye by the
 party for to pay the Rent to the Stranger. Then it was said,
 it was an Assignment for maintenance. Hales. That ought to
 have been averred. Then it was further said, that an Assign-
 ment transferring, when it cannot transfer, signifies nothing.
 Hales. But it is a Covenant, and then it is all one as if he had
 covenanted that he should have all the money that he should
 recover for his loss in such a Ship. Twiss. seemed to doubt.
 But Judgment.

(12.)
3 Keb. 304.

4 Co. 80.

Co. Lit. 213. a.

Lord Mordant *versus* Earl of Peterborough.(13.)
Supra 94. pl. 3.

TRial at Bar, the question was, Whether the Earl of Peterborough was Tenant for life only of the Mannor of Mayden: The Defendant did not appear, the Plaintiff thereupon desired to examine his Witnesses, that so he might preserve their Evidence. Twisd. When they do not appear, what good will that do you? for they will say, you set up a man of straw, and pull him down again. There was a former Deed of entail, with a power of revocation in it, and after the Deed exhibited was made, whereby the Estate was otherwise settled, and there was a Joynture to the present Lady, and done by persons of great Learning in the Law: The Revocation was to be by Deed under my Lord's Hand and Seal in the presence of three Witnesses: Now the question was whether this second Deed was a revocation in Law, and an Execution of that power? And the Court told the Counsel, they should find it specially if they would, but they refused. Hales. In 16 Car. Snape and Sturt's case, If there be a power of revocation, and a Lease for years is made, it both suspend quoad the term, but after it is good. Then it hath been questioned formerly if there be such a power, and the person makes a Lease and Release, whether it was a Revocation. But shall we conceive the learned Counsel in this case would have ventured upon an implicit revocation, and not have made an express revocation? So that you must be non-suit, or find it specially. But the issue being, If he were only Tenant for life, he said he must go back to the Chancery to amend it, for by the Deed produced, he hath an Estate for life, and the Reversion in Fee.

2 Rol. 263.

pl. 12.

1 Cro. 472.

Burgis *versus* Burgis. In Chancery.(14.)
Supra 50.
pl. 107.

A Man having a long Lease, settled it in Trust upon himself for life, the Remainder to his Wife for life, the Remainder to the first Son of their two bodies, the Remainder to the second Son, and so to the tenth Son; And if they should

should have no Son or Sons, then the Remainder to such Daughter and Daughters of their bodies, &c. The man and his wife died, and left only a Daughter, who preferred her Bill against the Trustees for the executing of this Remainder to her; The question is, whether this Remainder be a good Remainder, or whether it be void? And the Lord Keeper Finch held it was a void Remainder, because, it doth depend upon so many, and such remote Contingencies, for otherwise it would be a perpetuity. And he said, he would allow one Contingency to be good, viz. that to the first Son, though the first Son was not in esse at the time of his decease. And he said, he did deny my Lord Coke's Opinion in Leon. Lovells case, which saith, that in case of a Lease settled to one and the heirs males of his body, when he dies the Estate is determined; for he said it shall go to his Executors. And he said there was the same case with this in this Court, Backhurst *versus* Bellingham. And he said, that the Common Law did complain, that this Court did encroach upon them, whereas they are beholding to this Court for their rules in Equity, as, formerly when Ecclesiastical persons made Leases, a misnolmer would avoid them, but Elsinere in his time would notwithstanding the misnolmer make them good. And he cited a case in Dyer, and Matthew Manning's case Leon. Lovell and Lampert's case, and Child and Bailies case.

1 Sid. 37.

1 Sid. 37.

Another case in Chancery. One mortgaged Lands, then (15.) confest a Judgment, and died, The Mortgagee buys of the Mortgagee the Equity of Redemption for 200 l. The Bill was preferred by the Creditor by Judgment against the Mortgagee and Heir, either to be let in by paying the Mortgage money, or else that the 200 l. received by the heir, might be Assets; And the Court said, that the Mortgagee's Estate should not be stirred; But it was left to my Lord to be made a case, whether the two hundred pounds should be Assets in the hands of the heir.

Mortgage.

see 2. Vern. 663.



Mosedell the Marshall of the K. B's Case.

(16.)
3 Keb. 305.3 Co. 45.
1 Cro. 14.

A Trial at Bar ; An Action of Debt brought against Mosedell for the escape of one Reynolds ; The Plaintiff said, he could prove that he was at London three long Actions. Twissd. It is hard to put three Escapes upon the Marshall, for he may be provided only for one, and he cannot give in Evidence a Fresh pursuit, but it must be pleaded. Hales. I always let them give in evidence a Fresh suit upon a Nil debet. And Wild said, it was generally done. So they gave evidence of an Habeas Corp. ad test, and that the Prisoner went down too long before-hand, and stayed too long after the Assizes were done at Wells in Somerset-shire, and that he went back threescore miles beyond Wells before he returned again for London. Hales. If an Habeas Corpus be granted to bring a person into Court, and the Sheriff let him go into the Country, it is an escape. And though he be not bound to bring him the direct way, because he may be rescued, yet he ought not to carry him round about a great way for the accommodation of the party ; if he doth it is an Escape ; but by this Evidence you let him go back threescore miles, to which there can be no answer. An Habeas Corpus returnable immediate, is not fixt to an hour, but to a convenient time. They answered, that he went back to carry back some Writings. Counsel, Here is an escape of one of the parties, who dies before the Action brought, whereby the whole charge is surbided to the other before the Action brought ; and whether this shall purge the Escape is the question, or how far it shall purge it ? Wild. Before you brought your Action the Debt is gone, as to the Escape. Hales. We are made the Engines of doing all the mischief if this shall go unpunished, being by colour of an Habeas Corpus. So the Jury brought in a Verdict for the Plaintiff, who declared in Debt for 6200 l.

Green *versus* Proude.

A Trial at Bar ; The question, whether a Will or no (17.)
 Will ? The Plaintiff produced a Deed indented, made 3 Keb. 310. f. l.
 between two parties, the Dan and his Son : and the Father *see also 1.*
 did agree to give the Son so much, and the Son did agree to *West. 257.*
 pay such and such Debts and Sums of money : And there
 were some particular expressions resembling the form of a
 Will ; as, that he was sick of body, and did give all his
 Goods and Chattels, &c. but the Writing was both Sealed
 and delivered as a Deed ; And they gave evidence, that he
 intended it for his last Will ; which the Court said, was a
 good proof of his Will. Then the Defendant setting up an
 Entail, the Plaintiff exhibited an Exemplification of a Reco-
 very in the Marquess of Winchesters Court in ancient demesne ;
 The other side objected, that they did not prove it a true Co-
 py. But because it was ancient, the Court said they should
 not be so strict upon the Evidence of it, for the other side said, 10 Co. 92. b.
 the Court Rolls were burned in Baseing-house in the time of 98. a.
 the Wars. Hales. I remember a case, where one had gotten
 a presentation to the Parsonage of Gosnall in Lincoln-shire,
 and brought a Quare Impedit, and the Defendant pleaded an
 Appropriation ; there was no Licence of Appropriation produ-
 ced, but because it was ancient, the Court would intend it. 3
 Then they objected, that they ought to prove seisin in the Te-
 nant to the Præcipe. Hales. It being an ancient Recovery,
 we will not put them to prove that. He said the Mayor of
 Bristol had offered in evidence an Exemplification of a Reco-
 very under the Town Seal, of Houses in Bristol, the Records
 being burned, and that Exemplification was allowed for Evi-
 dence. Hales. If Tenant in Tail accept a Fine come ceo, &c.
 this doth not alter his Estate : If Tenant for life accept 2 Co. 55. b.
 of a Fine Sur conuſance, &c. he doth forfeit his Estate, but it 56. a.
 doth not alter the Estate for life. Co. Lit. 252. a.
 Objection, The Recovery
 is of Land in Kingscleare, whereas the Land claimed is in a
 particular Will called — And the Wills are several, and
 there are distinct Courts in every Will. Hales. There are se-
 veral Tryings of Dale, Sale and Downe, there is a Try-
 ingman in every particular place ; but the Constable of Dale
 goes through all ; these may go for several Wills, or one Will ;
 There

There may be a Mannor that hath several little Mannors within it, wherein are held several Courts for the ease of the Tenants, but all but one Mannor; And a Writ of Right close is, Quod plenum rectum, &c. and runs to the Bayliff of the Mannor, and may extend to the Precinct of the whole Mannor: as the Mannor of Barton hath several little Mannors under it, yet all within the Mannor. Hales. Where there is a Writ of Right close in ancient demesne, it is not like a demand to a Sheriff here, where he hath his direction for so many Acres. Maynard. But then he must demand it in the particular Vill where it is. Hales. If a Præcipe quod reddat be of Land in a Parish where it must be in a Vill, there may be exception to the Writ, but if he recovers it is good, for now the time is past; And so where it is infra manerium, if he recovers it is good.

Browne *versus* ----

(18.)
Franchis.

Supr. 35. pl. 83.
Ante 35.
1 Sid. 151.

AN Action brought in Canterbury Town; The Defendant removes it by Habeas Corpus: Then the Plaintiff declares here. It was moved that it might be tried in some other County, because the Judges came there so seldom. Court. Let them shew cause why they should not consent; and if they will plead Nil debet, the Plaintiff will be willing to let them give any thing in Evidence. And Simpson said, it was the Opinion of all the Judges, that upon Nil debet pleaded Entry and Suspension may be given in Evidence, which the Court did not deny: So the Court ordered the other side to shew cause why they should not consent.

(19.)
Attorney.

One Hillyard an Attorney sued for his fees in this Court, in the Court at Bristol: But the Court said, an Attorney ought not to waive this Court.

A motion

A motion was made by Sir William Jones for the Lord Mayor Starling, and the Recorder Howell : One Bushell brought an Action against them for False Imprisonment. And because the plea was long, he prayed he might have time to plead. Hales. I speak my mind plainly, that an Action will not lye ; for a Certiorari and an Habeas Corpus, whereby the body and proceedings are removed thither, are in the nature of a Writ of Error; And in case of an erroneous Judgment given by a Judge, which is reversed by a Writ of Error, shall the party have an Action of False Imprisonment against the Judge ? No, nor against the Officer neither : The Habeas Corpus and Writ of Error, though it doth make void the Judgment, it doth not make the awarding of the Process void to that purpose ; and the matter was done in a course of Justice : They will have but a cold business of it. An Habeas Corpus and Certiorari is a Writ of right, the highest Writ the party can bring. So day was given to shew cause.

(20.)
Supra 184.
pl. 15.
See Bushell's
Case reported
in Vaughn's
Reports 135.

Post. 184, 185.

Lord Tenham *versus* Mullins.

A Trial at Bar about a fraudulent Deed. Hales. There are three things to be considered, Fraud, Consideration, and Bona fide. Now the Bona fide is opposite to Fraud. I remember a case in Twine's case ; If the Son be dissolute, and the Father with advice of Friends doth settle things, so that he shall not spend all, though here be not a consideration of money, yet it is no fraudulent Deed ; and a Deed may be voluntary, and yet not fraudulent, otherwise most of the Settlements in England would be avoided ; and so said Twifden.

(21.)

Supra 76 pl. 34

Blackburn *versus* Graves.*Al. 1. Kent. 260.*

(22.)

TRober for 100 Loads of Wood; Not guilty pleaded; A special Verdict, that the Lands are Coppbold Lands, and surrendered to the use of one for eleven years, the Remainder for five years to the Daughter, the Remainder to the right heirs of the Tenant for eleven years; The eleven years expire, the Daughter is admitted, the five years expire; And there being a Son and Daughter by one Venter, and a Son by another Venter, the Son of the first Venter dies before admittance, and the Daughter of the first Venter and her Husband bring Trover for cutting down of Trees: And the question was, if the admittance of Tenant for years, was the admittance of the Son in Remainder? Levins. I conceive it is; and then the Son is seized, and the Daughter of the whole blood is his heir; and he cited 4 Co. 23. 3 Cro 503. Bunny's case. Wyld. The Estate is bound by the Surrender. Hales. If a man doth surrender to the use of John Styles, till admitted there is no Estate in him, but remains in the Surrenderor; but he hath a right to have an admittance; If a Surrender be to J. S. and his Heirs, his Heir is in without admittance if J. S. dies. About this hath indeed been diversity of Opinion, but the better Opinion hath been according to the Lord Coke's Opinion. I do not see any inconvenience, why the admission of Tenant for life or years, should not be the admittance of all in Remainder, for fines are to be paid, notwithstanding by the particular Remainders; and so the Books say it shall be no prejudice to the Lord. Twissden. I think it is strong, that the admission of Lessee for years, is the admission of him in Remainder; for as in a case of Possessio fratris the Estate is bound, so that the Sister shall be Heir; so here the Estate is bound, and goes to him in Remainder. Hales. I shall not prejudice the Lord; for if a Fine be assessed for the whole Estate, there is an end of the business; but if a Fine be assessed only for a particular Estate, the Lord ought to have another. If a Surrender be to the use of A. for Life, the Remainder to his eldest Son, &c. or to the use of A. and his Heirs, and then A. dies,

dies, the Estate is in the Son without admittance, whether he takes by purchase or descent. And Judgment was given accordingly.

Draper *versus* Bridwell. Rot. 320.

ALL the Court held, that an Action of Debt would lye upon a Judgment after a Writ of Error brought. (23.) 3 Keb. 330.

Twisden. They in the Spiritual Court will give Sentence for Tythes for takings, though they be never so involuntary. Tythes. 1 Rol. 645. pl. 11, 12.

Wyld said, that Actions personal transitory, though the party doth live in Chester, yet they may be brought in the King's Courts. (25.) Cinque Ports.

Hales. Shew a President where a man can wage his Law in an Action brought upon a Prescription for a duty; as, in an Action of Debt for Toll by Prescription, you cannot wage your Law. (26.) Ley.

Pybus *versus* Mitford. Postea 159. pl. 2.

The Chief Justice delivered his Opinion, Wyld, Rainsford and Twisden having first delivered theirs. Hales. (27.) 3 Keb. 338. I think Judgment ought to be given for the Defendant, whether the Son take by descent or purchase. I shall divide the case, (1) Whether the Son doth take by descent? (2) Admitting he doth not, whether he can take by purchase? We must make a great difference between Conveyances of Estates by way of use, and at Common Law; A man cannot convey to himself an Estate by a Conveyance at Common Law, but by way of Use he may. But now in our case here doth retourn by operation of Law an Estate to Michael for his life, which is

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consigned with the Limitation to his heirs. The reason is, because a Limitation to the heirs of his body, is in effect to himself: this is perfectly according to the intention of the parties. Objection. The use being never out of Michael, he hath the old use, and so it must be a Contingent use to the heirs of his body. But, I say, we are not here to raise a new Estate in the Covenantor, but to qualify the Estate in Fee in himself: for the old Estate is to be made an Estate for life, to serve the Limitation. Further Objection, It shall be the old Estate in Fee, as, if a man devise his Lands to his heirs, the heir is in of the old Estate. But, I answer, if he qualify the Estate, the Son must take it so, as, in Hutton fo. So in this case is a new qualification. Roll 789. 15 Jac. If a man makes a Feoffment to the use of the heirs of the body of the Feoffor, the Feoffor hath an Estate Tail in him, Pennell *versus* Fenne, Moor 349. Englefield and Englefield. (2) I conceive, if it were not possible to take by descent, this would be a Contingent use to the heirs of the body. Objection, It is limited to the heir when no heir in being; Why, I say it would have come to the heir at Common Law, if no express Limitation had been, and it cannot be intended that he did mean an heir at Common Law, because he did specially limit it. Fitz. tit. Entayle 23.

(28.)

An Assise for the Serjeant at Mace's place in the House of Commons. The Plaintiff had his Patent read; The Court asked if they could prove Seisin; They answered, that they had recovered in an Action upon the case for the mean profits, and had Execution. Court. For ought we know, that will amount to a seisin. Twisden. Upon your grant since you could not get seisin, you should have gone into Chancery, and they would have compelled him to give you seisin. Hales. A man may bring an Action upon the case for the profits of an Office, though he never had seisin; So the Record was read of his Recovery in an Action upon the case for the profits. Hales. This is but a seisin in Law, not a seisin in Fact; The Counsel for the Plaintiff much urged, that the Recovery and Execution had of the profits, was a sufficient seisin to entitle them to an Assise. It was objected, that

4 Co. 9. b.
1 Rol. 303.
pl. 2.

that the Plaintiff was never invested into the Office. Hales. said, That an investiture did not make an Officer when he is created by Patent, as this is; but he is an Officer presently. But if he were created an Herald at Arms (as in Segar's case) he must be invested before he can be an Officer; a person is an Officer before he is sworn. Hales. You are the Pernor of the profits, and they have recovered them; is not this a Seisin against you? They should find it specially, but they chose rather to be Non-suit, because of the delay by a special Verdict. And the Court told them, they could not withdraw a Juroz in an Assise, for then the Assise would be depending. The Roll of the Action sur le case fuit 19 Car. 2. Mich. Rot. 557.

Term. Trin. 15 Car. II. 1663.

Judge Hide's Argument in the Exchequer-Chamber.

Manby *versus* Scott.

(1.)
Assumpsit vers
Baron & Feme
pur Wares
vend & deliver
al Feme.
Sid. 109. pl. 1.
1 Brook. 47.
1 Keb. 96.
1 Sid. 109.
Allein 61.

A Feme Covert departs from her Husband against his will, and continues absent from him divers years; afterwards the wife desires to cohabit with her husband again, but the husband refuseth to admit her; and from that time the wife lives separate from him: During this separation, the husband forbids a Tradesman of London to trust his Wife with any Goods or Wares; yet for divers years before and afterwards, allows his wife no maintenance; the Tradesman, contrary to the prohibition of the Husband, sells and delivers divers Wares to the wife upon credit, at a reasonable price; and the Wares so sold and delivered to the wife are necessary for her, and suitable to the degree of her husband: The Wares are not paid for; wherefore the Tradesman brings an Action upon the case against the husband, and declares that the husband was indebted to him in 40 l. for divers Wares and Merchandises formerly to the Husband sold and delivered, and that the Husband in consideration thereof did promise to pay him the said 40 l. That the Husband hath not paid the same unto him, although thereunto required; and for that money the Action is brought against the Husband. And, whether this Action will lie against the Husband for the Wares thus sold and delivered to the wife, against the will, and contrary to the Prohibition of the Husband, or not, is the question? This case is the meanest that ever received Resolution in this place, but as the same is now handled, it is of as great consequence to all the King's people of this Realm, as any case can be; it concerns every individual person of both Sexes, that is, or hereafter shall be

be married within this Kingdom, in the first and nearest Relation, that is, betwixt man and wife. The holy state of Matrimony was ordained by Almighty God in Paradise, before the Fall of man, signifying unto us that mystical Union which is between Christ and his Church, and so it is the first Relation: And when two persons are joyned in that holy State, they twain become one Flesh, and so it is the nearest Relation. This case toucheth the man in point of his power and dominion over his wife, and it concerns the woman in point of her substance and livelihood. I will deliver my Opinion plainly and freely, according as I conceive the Law to be, without favouring the one, or courting the other Sex. I hold, that Judgment ought to be given for the Defendant. The case hath been so fully argued, and all the Authorities so particularly vouched by my Brothers who have already delivered their Opinions, that nothing is left for me to say, which hath not been spoken by them in better terms than I can express my self. It will be a trouble to your Lordships for me to repeat their Arguments, and yet without doing so, it will be impossible for me to speak any thing to the purpose. It shall be my endeavour therefore, rather to answer the reasons and objections given and made by my two Brothers, who have so copiously argued for the womans power, than to argue the case again on the same grounds which have been already delivered.

It is agreed by all my Brothers who have argued, as I conceive, that a Feme covert generally cannot bind or charge her husband by any Contract made by her, without the authority or assent of her husband precedent or subsequent, either express or implied. But the question in this case is, if the Contract of a Feme covert for Wares for her necessary Apparel, made without the consent, and contrary to the Prohibition of her husband, shall bind her husband?

First, I hold that the husband shall not be charged by such a Contract, although he do not allow any maintenance to his wife.

Secondly, admit the husband were chargable generally by such a Contract, yet I conceive that this Action doth not lye for the Plaintiff, as this Declaration is, and as this Verdict is found against the Defendant in this particular case.

For the first, every gift, contract or bargain, is or contains an agreement, for the contractor or bargainer will that the donee or bargainer shall have the things contracted for; and the other is content to take them, and so in every Contract there is a mutual assent of their minds, which mutual assent is an agreement: Plow. Com. Fogassa's case. Afterwards in the same Case f. 17. it is said, agreement is a word compounded of two words, scilicet. aggregatio & mentium, so that agreeementum is aggregatio mentium, or thus, agreeementum is no other but a union or conjunction of two minds in any matter or thing, done, or to be done, according to that of Sir Edward Cokes Com. f. 47. Contractus est quasi actus contra actum: But a Feme Covert cannot give a mutual assent of her mind, nor do any act without her husband; for her will and mind (as also her self) is under and subject unto the will or mind of her husband; and consequently she cannot make any bargain or contract (of her self) to bind her husband. The second ground of the Law of England is the Law of God, Doctor & Student cap. 6. f. 10. In the beginning when God created woman an help-meat for man, he said, they twain shall be one flesh; and thereupon our Law says, that husband and wife are but one person in the Law: Presently after the Fall, the Judgment of God upon woman was, Thy desire shall be to thy Husband, for thy will shall be subject to thy husband, and he shall rule over thee, 3 Gen. 16. Whereupon our Law put the wife sub potestate viri, and says, quod ipsa potestatem sui non habeat, sed vir suus, and is disabled to make any grant, contract or bargain, without the allowance or consent of her husband, Bract. lib. 3. cap. 32. f. 15. The books and authorities of our Law which prove this point, have been all particularly vouched already, and I will not repeat them again, nor do I know any one particular point to the contrary. The words of the book are observable, namely, If a Feme Covert make a contract, or buy any thing in the Market or elsewhere, without the allowance or consent of her husband, although it come to the use of the husband, yet the contract is void, and shall not charge the husband; but if a man command or licence his wife to buy things necessary, or agree that she shall buy, he shall be bound by this command or licence: Old N. Br. 62. 21 H. 7. 70. F. N. Br. 120. which proves, that it is not the buying or contract of the wife, which binds or charges the husband (for that is void in it self) but the

1 Rol. 351.
pl. 45, 46.

the command or licence of the Husband, which makes it the contract or bargain of the husband.

As to my Brother Twissden's saying, that all those books are where the wife deals or trades as a factor to her husband, and all grounded upon that reason, the words themselves prove the contrary; for the difference taken by all those books is, between the buying and contract of the wife without the knowledge or consent of her husband; and a buying or contract had by the wife with allowance or command of the husband. In the first case, the buying or contract is void, in the other the allowance or command makes it good, as the contract or bargain of the husband: Besides, weigh the inconveniencies which would follow, if the Law were otherwise. Judges in their Judgments ought to have a great regard to the generality of the cases of the King's Subjects, and to the inconveniencies which may ensue thereon by the one way or the other, 1 Rep. 52. Altenwood's case.

Judges in giving their resolutions in cases depending before them, are to judge of inconveniencies as things illegal, and an argument ab Inconvenienti is very strong to prove that it is against Law. Plo. Com. 279. 379. then examine the inconveniencies which must ensue if the Law were according to my Brother Twissden's and Tyrrell's Opinions: If the contract or bargain of the wife, made without the allowance or consent of the husband, shall bind him upon pretence of necessary Apparel, it will be in the power of the wife (who by the Law of God, and of the Land, is put under the power of the husband, and is bound to live in subjection unto him) to rule over her husband, and undo him, mangle his head, and it shall not be in the power of the husband to prevent it. The wife shall be her own Carver, and judge of the fitness of her Apparel, of the time when 'tis necessary for her to have new Cloathes, and as often as she please, without asking the advice or allowance of her husband; And is such power suitable to the Judgment of Almighty God inflicted upon woman, for being first in the Transgression? Thy desire shall be to thy husband, and he shall rule over thee. Will wives depend on the kindness and favours of their husbands, or be obedient towards them as they ought to be, if such a power be put into their hands?

Secondly,

Secondly, Admitt that in truth the Wife wants necessary Apparel, Woollen and Linnen thereupon, she goes into Paternoster-Row to a Mercer, and takes Stuff, and makes a Contract for necessary Clothes, thence goes up into Cheap-side and takes up Linnen there in like manner, and also goes into a third Street, and fits her self with Ribbons, and other necessities suitable to her occasions and her Husbands degree. This done, she goes away, disposeth of the Commodities to furnish her self with Money to go abroad to Hide-Park, to score at Gleek, or the like. Next morning this good Woman goes abroad into some other part of London, makes her necessity and want of Apparel known, and takes more Wares upon trust, as she had done the day before, after the same manner she goes to a third and fourth place, and makes new Contracts for fresh Wares, none of these Tradesmen knowing or imagining she was formerly furnished by the other, and each of them seeing and believing her to have great need of the Commodities sold her; shall not the Husband be chargeable and lyable to pay every one of these, if the contract of the Wife doth bind him? Certainly every one of these hath as just cause to sue the Husband as the other, and he is as lyable to the Action of the last, as the first or second, if the Wifes Contract shall bind him; and where this will end no man can divine or foresee.

As for my Brother Tyrrel's saying we may not alter the Law, because an inconvenience may follow thereon, this is true: but we ought to foresee and provide against such inconveniencies as may arise, before we adjudge or declare the Law in a particular case in question, whether the Law be so or not. And that is the case here; It is objected, that the Husband is bound of common right, to provide for, and maintain his Wife; and the Law having disabled the Wife to bind her self by her Contract, therefore the burthen shall rest upon the Husband, who by Law is bound to maintain her, and he shall do it nolens, volens; generally the antecedent is most true; for she is Bone of his Bone, Flesh of his Flesh, and no Man did ever hate his own Flesh, so far as as not to preserve it.

But apply this general proposition to our particular case, and then see what Logick there is in the argument. I am bound to maintain and provide for my Wife: therefore (my Wife) departing from me against my will, shall be her own
 Carver,

Carber, and take up what Apparel she pleaseth upon trust, without any p^rivity or allowance, and I shall be bound to pay for it; this is our case, for there is not a word throughout the whole *Credia*, that the wife did want necessary Apparel, that she ever acquainted her husband with any such matter, that she ever desired the husband to supply her with money to buy it, or otherwise to provide for her: or that the husband did deny, refuse, or neglect to do it. Besides, although it be true, that the husband is bound to maintain his wife, yet that is with this limitation, viz. so long as she keeps the station wherein the Law hath placed her, so long as she continues a help meet unto him; for if a woman of her own head, without the allowance or Judgment of the Church, which hath united them, in the holy State of Matrimony (which only can separate that, or dissolve this Union) depart from her husband against his will, (be the pretence what it will) she doth thereby put her self out of the husbands protection, so that during this unlawful separation, she is no part of her husbands care, charge or family. The King is the Head of the Commonwealth: his Office is, and he is bound of right to protect and preserve his Subjects in their Persons, Goods and Estates. And on that ground, every loyal Subject is said to be within the King's Protection: *Plo. 315. Case of Mines, F. N. Br. 232.*

But a man may put himself out of the King's Protection by his Offence, as, by forsaking his Allegiance to the King, and owning or setting up any Foreign Jurisdiction, and then every man may do unto him as to the King's Enemy, and he shall have no remedy or Recovery by the King's Laws or *Writs*, 27 E. 3. case the first. The husband is head of the wife, as fully as the King is Head of the Commonwealth; and the wife by the Law is put sub potestate viri, and under his protection, although he hath not potestatem vitæ & necis over her, as the King has over his Subjects. When the wife departs from her husband against his will, she forsakes and deserts his Government, she erects and sets up a new Jurisdiction, and assumes to govern her self, besides, (at least if not against) the Law of God and of the Land; and therefore it is but just that the Law for this Offence, should put her in the same plight in the petit Commonwealth of the Household, that it puts the Subject for the like Offence in the great Commonwealth of the Realm; and this according to

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the Civil Law, namely, Si uxor propria (sine Culpa mariti) sit extra consortium viri, nec tenet maritus extunc ei extra consortium suum existenti aliquantulum subministrare, videtur enim virum alendi obligatione fore exemptum quoniam Culpa sua extra viri Consortium est. For Nuptiæ sunt Conjunctio Maris & Fœminæ & Consortium ejus divini & humani Juris Communicatio, digestum de ritu Nuptiarum. Fleta speaking of Appeals, hath this expression, Fœmina de morte viri sui inter brachia sua interfecti, & non aliter potuit appellare, l. 1. c. 33. Bracton is much to the same purpose, l. 3. chap. 24. f. 148. Non nisi in duobus casibus fœmina appellum habeat, sc. non nisi de violentia corpori suo illata, sicut de rapto & de morte viri sui interfecti inter brachia sua; and the words of the Writ of Appeal are suitable thereunto, sc. venit idem A. B. & nequiter & in feloniam, &c. occidit ipsum virum suum inter brachia sua, &c. By the words inter brachia sua, in those ancient Authors is understood the wife, which the dead person lawfully had in possession at the time of his death; for she ought to be his wife of right, and also in possession, Com' S. Magn. Chart. f. 68. The words of the Writ are observable, sc. occidit virum suum inter brachia sua, and prove that the woman ought to be inter brachia viri sui, or otherwise she hath not the privilege of a wife.

By an argument a pari, as the wife shall not have remedy against the Murderer of her Husband after his death, if he were not inter brachia sua, at the time of his death, pari ratione she shall not have support or maintenance from her husband in his life, when she puts her self extra brachia sua, against his will.

But 'tis objected by my Brother Tyrrel; It appears not in whose default this departure was, whether in his or her default. Thereto I answer, that the Law doth not allow a wife to depart from her husband in any case, or for any cause whatsoever of her own head. An express command is laid upon her by the Law of God to the contrary, Cor. 7. 10. To the married I command, yet not I, but the Lord; let not the wife depart from her husband.

The provision which our Law hath made for the safeguard of the person of a woman, in case of cruelty by her husband, and for her maintenance in case the husband refuses to allow it, proves, that it is not lawful for the wife to depart from her husband of her own head, upon any pretence whatsoever.

If the wife be in fear, or in doubt of her husband, that he will beat or kill her, she shall have a Supplicavit out of the Chancery against her husband, and cause him to find Sureties that he will not beat, nor intreat her otherwise than in civil manner, and for to order and rule her, &c. F. N. Br. f. 179. The words of the Writ are, Quod ipsum B. coram te corporaliter venire fac', & ipsum B. ad sufficien' manucaption' inveniend', &c. quod ipse præfat' B. bene & honeste tractabit gubernabit ac dampnum & malum aliquod eidem A. de corpore suo alit' quam ad virum suum ex causa regiminis & castigationis uxoris suæ licite & rationabilit' pertinet, non faciat nec fieri procurabit. And if the husband refuse to give or allow necessary and fitting maintenance unto his wife, the Law hath provided a remedy for her, by complaint to the Ordinary in the Ecclesiastical Court.

Next, it is alledged by my Brother Tyrrell, that the wife in our case did return, and desire to cohabit with her husband again, which he refused, and so she is remitted to her former condition. Admit that be true, yet her return hath not put her in a better condition than she was in before her departure, in which case she could not be her own Carver, and have charged her husband (according to her pleasure) with Apparel, but was to be clothed in such sort as her husband thought fit. Besides, in our case the wife departed from her husband, and lived from him divers years after (before the Wares sold, or the Action brought) then she desired to cohabit with him, which he refused to admit; and from that time she lived from him. This is all that appears in our case; and is this offence so easily purg'd, with a bare desire to cohabit, without any other submission and satisfaction given of the better carriage in futuro? The Law of God says, Wives be in subjection to your husbands as unto the Lord: for the husband is the head of the wife, as Christ is head of the Church, 1 Pet. 3. 4. Ephes. 5. 22. The Church declares, that one of the principal ends for which Marriages was ordained, is for the mutual society, help and comfort, which the one ought to have of the other, in prosperity and adversity. It is also there said the woman of her self in contracting of Marriage, makes a solemn Vow in facie Ecclesiæ, to live together with her husband, in the holy State of Matrimony, to obey him, and serve him, to love him, and keep him in sickness and in health, till death them do part.

The wife, in our case, by departing from her husband against his will, breaks all those commands, and her own Vow; she makes a voluntary separation, and temporary Divorce between her self and her husband, she deprives him of that mutual society, help and comfort (which she owes to him) for divers years; and are all these Offences washed away with a bare desire, without submission or contrition? No certainly, Confession and promise of future Obedience, ought to precede her remitter, or restitution to the priviledges of a wife. The Prodigal Son in the Gospel, said, I will arise and go to my Father, and say, I have sinned, before the Indulgent Father did receive or Cloath him. And this is according to the rule in the Civil Law, Si Uxor quæ (Culpa sua) recesserat pœnitentia ducta ad virum rediens nolit admitti eam ex tunc Culpa purgatur in virum transfundit' tenebitur quæ ipsi seorsum habitanti alimenta præstare. So that the wife ought to be a Penitentiary before the husband is bound to receive her, or give her any maintenance. And no such thing appears, or is found in the Verdict in our case.

It is said by my Brother Twisden: Although the wife departs from her husband, yet she continues his wife, and she ought not to starve. If a woman be of so haughty a stomach, that she will chuse to starve, rather than submit, and be reconciled to her husband, let her take her own choise. The Law is in no default, which doth not provide for such a wife. If a man be taken in execution, and lye in Prison for Debt, neither the Plaintiff at whose suit he is arrested, nor the Sheriff who took him is bound to find him Meat, Drink or Cloathes; but he must live on his own, or on the Charity of others; and if no man will relieve him, let him dye in the name of God, says the Law; Plow. 68. Dive & Manningham: So say I; if a woman who can have no Goods of her own to live on, will depart from her husband against his will, and will not submit her self unto him, let her live on Charity, or starve in the name of God; for in such case the Law says, her evil demeanour brought it upon her, and her death ought to be imputed to her own willfulness. As to my Brother Tyrrell's Objection, it were strange if our Law, which gives relief in all cases, should send a woman unto another Law or Court to seek remedy to have maintenance. I answer. Its not sending the wife to another Law, but leaving the case to its proper Jurisdiction; the case being of Ecclesiastical Conusance. Is it any

any strangeness or disparagement to the Common-Pleas, to send a Cut-purse, or other Felon taken in the Court to the King's Bench to be indicted? or to the King's Bench, to send a woman to the Common-Pleas to recover her Dower? Why is it more strange for the Common Law to send a Woman to the Ordinary to determine differences betwixt her and her husband touching matters of Matrimony, than for our Courts at Common Law to write unto the Ordinary to certify Loyalty of Marriage, Bastardy, or the like, where Issue is joined on these points in the King's Courts? for although the proceeding and process in the Ecclesiastical Courts be in the names of the Bishops, yet these Courts are the King's Courts, and the Law by which they proceed is the King's Law: 5 Rep. 39. Caudrie's case, but the reason in both cases is, quia hujusmodi causæ cognitio ad forum spectat Ecclesiasticum, 30 H. 6. b. Old book of Entries 288. according to that of Bracton, lib. 3. f. 107. Stamf. 57. Sunt casus spirituales in quibus Judex secularis non habet cognitionem neque Executionem quia non habet coercionem: In his enim casibus spectat cognitio ad Judices Ecclesiasticos qui regunt & defendunt Sacerdotium. Pereunto agrees Cawdrie's case, 5 Rep. 9. As in temporal causes, the King by the mouth of his Judges in his Courts of Justice, determines them by the temporal Law, so in causes Ecclesiastical and Spiritual (the Countenance whereof belongs not to the Common Law) they are decided and determined by the Ecclesiastical Judges, according to the King's Ecclesiastical Laws; And that causes of Matrimony, and the differences between husband and wife touching Alimony, or maintenance for the wife (which are dependant upon, or incident unto Matrimony) are all of Ecclesiastical, and not of secular Countenance, is evident by the Books and Authorities of our Laws, de causa Testamentari sicut nec de causa Matrimoniali Curia Regia se non intromittat, sed in foro Ecclesiastico debet placitum terminari, Bracton, lib. 2. cap. 20. f. 7. All causes Testamentary, and causes of Matrimony by the Laws and Customs of the Realm, do belong to the spiritual Jurisdiction, 24 H. 8. cap. 2.

The words of the Writ of Prohibition granted in such cases are, placita de Carallis & debitis quæ sunt de Testamento vel Matrimonio spectant ad forum Ecclesiasticum. In a suit commenced by a woman against her husband before the Commissioners for Ecclesiastical causes for Alimony, a Prohibiti-

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on was prayed, and granted, because it is a suit properly to be brought and prosecuted before the Ordinary. In which if the party find himself grieved, he may have relief by Appeal unto the superiour Court, and that he cannot have upon a sentence given in the high Commission Court, 1 Cro. 226. Drakes case.

But 'tis objected by my Brother Tyrrell and Twisden, that the remedy in the Ecclesiastical Court is not sufficient: for if the husband will not obey the Sentence of the Ordinary, it is but Excommunication for his Contumacy, and will neither feed nor cloath the wife. Are the Censures of the holy Mother the Church, grown of so little Accompt with us, or the separation, a communione fidelium, become so contemptible, as to be slighted, with but Excommunication? Hath our Law provided any remedy so penal, or can it give any Judgment so fearful as this? With us the rule is, committitur Mareſcal', or Prison' de Fleet. There the Sentence is, traditur Satanæ; which Judgment is more penal? Take him Gaoler till he pay the Debt, or take him Devil till he obey the Church. And yet their Judgment is warranted by the rule of St. Paul, whom I have delivered unto Satan, 1 Cor. 5. 5. whereupon the Comment says, Anathema ab ipſo Christi corpore (quod est Ecclesia) recidit. Causa 3 quest. 4 Cam' Egell trudem, and also, Nullus cum Excommunicatis in oratione aut cibo aut potis, aut esculo communicet, nec Ave eis dicat. Causa, 2 quest. 3 Can. Excommunicat', Braſton lib. 5. cap. 23. f. 42. As much is said by our Law, and it is to the same effect, Excommunicat' interdicitur omnis actus legitimus, Ita quod agere non potest nec aliquem convenire cum ipſo, nec orare nec loqui, nec palam, nec abscondite vesci licet.

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The second ground of the Law of Excommunication, is the Law of England; and it is a ground in the Law of England, That he which is accursed shall not maintain any Action, Doctor & Stu. 11. Where a man is excommunicated by the Law of the Church, if he sue any Action, real or personal, the Tenant or Defendant may plead, that he is Excommunicated, and demand Judgment, if he shall be answered, Lit. 201. the Sentence is set forth at large in the old Statute Book of Magna Charta, and is intituled, Sententia lata super chartas, namely, Autoritate Dei patris omnipotentis & filii & spiritus Sancti Excommunicamus Anathematizamus. & a liminibus Sanctæ matris Ecclesiæ sequeſtram' omnes illos, &c. 12 H. 3. f. 146

f. 146. He which by the Renunciation is rightfully cut off from the Unity of the Church, and Excommunicate, ought to be taken by the whole multitude as a Heathen and a Publican, until he be openly reconciled by Penance. Act 33. confirm' per 13 Eliz. cap.

and this is grounded on the rule of our blessed Saviour, die' Ecclesiæ; And if he neglect to hear the Church, let him be as an Heathen and Publican, Matt. 18.

17. Shall a man be accursed, barred of the Company or Society of Christians, cut off from the body of Christ, accounted as a Heathen and Publican, for not allowing maintenance to his wife, when the Church enjoyns him so to do; and shall not this be accounted a sufficient remedy for the wife? I fear it is the want of Religion, and due credence to the Censures of the Church, which occasions this Objection, rather than real want of sufficient remedy in Law for her relief.

The last matter to be answered, is rather the Opinion of my Brother Twisden and Tyrrell in their arguments, thap an Objection in this case; namely, if an Action upon the case doth not lye against the husband upon the Contract of the wife for necessary Apparel, yet an Action of Trover and Conversion doth lye against him for the Stuff; and so one way or other the husband must pay the reckoning. If the Law should be so, it were a Conversion with a witness, for then the husband should seem to be *sub potestate fœminæ*: he might glory in the words of St. Paul, I would have you know, that the head of the woman is the man. But if the wife shall set his cap, or lay his headship in the Gaol, it shall not be in the power of the husband to prevent or avoid it: one kind of Divorce between husband and wife is, when Action of Trespass is brought against them, and the husband only appears, and Process issue out against the wife, until she be waived and outlawed, she can never purchase her pardon, or reverse the outlawry unless the husband will appear; so that if the husband please he is divorced, 14 H. 6. 14. a. If the wife be outlawed by erroneous Process, and the husband will not bring a Writ of Error, he may by this way be rid of a Shrew, and that doth counterbail a Divorce, 18 E. 4. 4. a.

By these books it appears, that the Law puts a power in the husband to be rid of his wife, and provides a remedy to tame a Shrew; but I never heard before, that the Law hath left it in the power of the wife to do so by her husband; and
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I do not remember that my Brothers did vouch any Authority, or give any reason for maintenance of their Opinions; and therefore I may with freedom deny the Law to be as they have said: besides, the nature of an Action of Trover proves that it lies not in this case. The Count is, that the Plaintiff was possessed of such Goods, (and names them) as of his own proper Goods, and casually lost them; that the Goods came to the Defendants hands by finding, yet he knowing them to belong to the Plaintiff, refuseth to deliver them to him, but hath converted them to his own use; so that an Action is grounded upon a wrong supposed to be done by the Defendant, in converting the Goods of the Plaintiff knowingly to his own use, against the will of the Plaintiff: and that is the reason why the Plaintiff in that Action, must prove a demand of the Goods, and an actual Conversion by the Defendant, or else he fails in the Action.

In an Action of the Case, for that the Defendant did find the Goods of the Plaintiff, and delivered them to persons unknown, *Non deliberavit modo & forma*, is no Plea, without saying Not-guilty, where the thing rests in Fealance; and if the Action be, that the Plaintiff was possessed, *Ut de bonis propriis*, and the Defendant did find and convert them to his own use: It is no plea that the Plaintiff was not possessed, *Ut de bonis propriis*, but he must plead Not-guilty, to the misdemeanour, and give the other matter in Evidence, 33 H. 8. & Mar. Bro. Action sur le case.

Co. Lit. 283.a.

In Trover the Plaintiff declares, that he was possessed of such Goods, and casually lost them, and the Defendant found them, and converted them to his own use, the Defendant did plead, that the Plaintiff did gage the Goods unto him for 10 l. and that he detained the Goods for 10 l. this is no Plea; but he ought to plead Not-guilty, and give this matter in Evidence; for the Action doth suppose a wrong, which the Defendant ought to answer, 4 E. 6. Action sur le case 113. What wrong is done to the Plaintiff in our case, when he himself sells and delivers the Goods? It is not like the case where two men by mutual consent, Waste or play at Football together, will an Action of Assault and Battery lye for the one against the other, when the act is done by their mutual agreement before-hand? Put the case of Sale made to a man upon credit, and the Vendee promiseth to pay for the Goods at Michaelmas, but fails to pay the money accordingly,

cordingly, shall the Salesman have Trover against the Vendee, because he pays not the Money at the day? and will the Sale to this Feme Covert alter the case, or the Law as to the Action? Its true, that for a Conversion by the woman before Coverture, or by the wife during the Coverture, an Action of Trover lies against the husband and wife: but that is for a Conversion by wrong when she takes the Goods, and converts them against the will of the Owner, 1 Cro. 10. 254. Remis and Humfrey's Case as in case where a Man comes to buy Goods, and offers 10 l. for them, and the Owner agrees to accept the Money, whereupon the Buyer takes the Goods away, without payment or delivery by the Owner, there an Action of Trespass or Trover lies, notwithstanding the Bargain, 21 H. 7. 6. otherwise it is if they agree upon a price, and the Vendor takes the Vendor's word for payment, and delivers the Goods unto him; there the Vendor is put to his Action for the Money upon the Contract, and shall not bring Trover for the Goods, 14 H. 8. 22.

If an Infant give or sells Goods, and delivers them with his own hand, he shall have no Action of Trespass against the Donor or Vendor, by reason of the delivery, 21 H. 7. 39. 26 H. 8. 2. but if an Infant give or sell Goods, and the Vendor or Donor takes them by force of the gift or sale, the Infant may have an Action of Trespass against him. So in our Case: If a Feme Covert takes Wares of a Shop-keeper against his will, upon pretence of buying them, an Action lies against the husband; but if the Owner sell the Goods to the wife upon trust, and delivers the Goods unto her, he shall not have an Action of Trespass against the husband, by reason of this delivery. If a Man take my wife and cloath her, this amounts unto a Gift of the Apparel unto her, 11 H. 4. 83. and I may take my wife with the Apparel, and no Action lies against me: By the same reason, when a Man delivers Stuff, or other Wares to my wife, knowing her to be a Feme Covert, to make Apparel, without my privity or allowance, this shall be construed to be a gift of the Stuff unto her, and I shall not be charged in any Action for it; besides, consider the inconveniencies which will follow, if an Action of Trover should be against the husband: for then the husband shall be barred of all those helps which my Brothers, (who maintain that Opinion) have allowed unto him, and have made Reasons, for which an Action of the Case should lie against

1 Cr. 344.
Finch 22.

against him on the Contract; namely, the Jurors are to examine and set the price or value, and the necessity and fitness of things, with relation to the degree of the Husband, where by care is taken, that the Husband have no wrong; for in an Action of Trover, the Jury cannot examine any of those matters; but are to enquire only of the property of the Plaintiff, and the conversion by the Defendant, and to give Damages according to the value of the Goods: and so it shall be in the power of the wife to take up what she pleaseth, and to have what she likes without reference unto the degree or respect to the Estate of her husband, and he shall be charged with it, *nolens volens*.

It is objected, that the Jury is to judge what is fit for the wives degree, that they are trusted with the reasonableness of the price, and are to examine the value; and also the necessity of the things or Apparel. Alas poor Man! what a Judicature is set up here to decide the private differences between husband and wife; the Wife will have a Velvet Gown and a Satten Petticoat, the husband thinks Mohair or Farendon for a Gown, and watered Tabbie for a Petticoat, is as fashionable, and fitter for his quality; the husband says that a plain Lawn Corset of 10 s. pleaseth him, and suits best with his condition, the Wife will have a Fander lace, or Pointed Handkerchief of 40 l. and takes it up at the Exchange. A Jury of Mercers, Silk-men, Sempsters and Exchange-men, are very excellent and very indifferent Judges to decide this Controversie; It is not for their avail and support to be against the wife, that they may put off their trayded Wares to the wife upon trust, at their own price, and then sue the Husband for the Money. Are not a Jury of Drapers and Milliners bound to favour the Mercer or Exchange Men to day, that they may do the like for them to morrow?

And besides, what matter of Fact (and of that only the Law hath made Jurors the Judges) is there in the fitness of the Commodities with reference to the degree of the husband? and whether this or that thing be the most necessary for the wife? the matter of Fact is, to find that the wife wanted necessary Apparel, and that she bought such and such wares of the Plaintiff, at such a price, to cloath her self, and leaves the fitness of the one, and the reasonableness of the other to the Court, for that is matter of Law, whereof the Jurors have no Consuance. Lessee for Life of a House, puts his Goods therein

therein makes his Executors, and dies; whosoever hath the House after his death, yet his Executors shall have free Entry, Egress and Regress to carry their Testators Goods out of the House by reasonable time, Litt. 69. And this reasonable time shall be adjudged by the discretion of the Justices before whom the cause depends, upon the true state of the matter, and not by the Jury, Co. super Littleton 56. b. So it is in case of fines for Admittance, Customs and Services: If the Question be, whether the same be reasonable or not; for reasonableness belongs to the knowledge of the Law, 4 Co. 27. Hubart's Case. Lessee for Life makes a Lease for years, and dies within the term, in an Action of Trespass brought by the first Lessor against the Lessee for years, he ought by his Plea to set forth what day his Lessor died, and at what place, where the Land lies, and at what day he did leave the possession, and so leave it to the discretion of the Court, whether he did quit the possession in reasonable time or not, 22 E. 4. 18. Soinor's Case. The time or necessity of Apparel, and the reasonableness of the price, shall be judged by the Court, upon the Circumstance of the matter, as the same appears by the Pleadings, or is found by the Jury, but the Jurors are not Judges thereof. Again, there is a two-fold necessity, *necessitas simplex, vel absoluta*, and *necessitas qualificata, vel convenientia*; of a simple or absolute necessity in the case of Apparel or Food for a feeble Covert, the Law of the Land takes notice, and provides remedy for the wife, if the Husband refuse or neglect to do it. But if it be only *necessitas convenientia*, whether this or that Apparel, this or that Meat or Drink is most necessary, or convenient for any wife, the Law makes no person Judge thereof, but the husband himself; and in those Cases no Man is to put his hand between the Bone and the Flesh.

I will conclude the general Question, or first Point, with the Judgment of Sir Thomas Smith, in his Book of the Commonwealth of England, lib. 1. c. 11. f. 23. The naturallest and first conjunction of two towards the making a farther Society of continuance, is of the husband and wife, each having care of the Family, the Man to get, to travel abroad, to defend; the Wife to save, to stay at home and distribute that which is gotten for the nurture of the Children and Family, is the first and most natural, but prime appearance of one of the best kind of Commonwealths, where not one always, but sometime, and in some things, another bears

rule : which to maintain, God hath given to the Man greater wit, better strength, better courage to compel the Woman to obey, by reason of force, and to the Woman beauty, fair countenance, and sweet words to make the Man obey her again for love. Thus each obeyeth, and commandeth the other, and they two together rule the House, so long as they remain together in one. I wish with all my heart, that the Women of this age would learn thus to obey, and thus to command their Husbands : so will they want for nothing that is fit, and these kind of Flesh flies shall not suck up or devour their Husbands Estates by illegal tricks.

I am come now to this particular Case, as it stands before us on this Record. Admit that the husband were chargeable by Law by the Contract of his wife, yet Judgment ought to be given against the Plaintiff, upon this Declaration, as this Verdict is found.

Allen 73.

First, the Declaration is, That the Defendant was indebted to the Plaintiff in 90 l. for Wares and Merchandizes by the Plaintiff to him before that time sold and delivered; and the Verdict finds, that the Wares were not sold and delivered to the Defendant, but the same were sold to his wife without his privity or consent. So it appears that the Plaintiff hath mistaken his Action upon the Case, for Wares sold unto him, and ought to have declared specially, according to the truth of his Case, for Wares sold to his wife for necessary Apparel. In an Action of Battery against the Husband and Wife, the Plaintiff counted that they both did Assault and beat him. Upon Not-Guilty pleaded, the Jury found, that the Wife alone did make the Assault, and not the Husband; Vel. 106. Darcy and Denier's Case : and the Verdict was against the Plaintiff, because now the Plaintiffs Action appeared to be false ; for the Husband ought not to be joyned but for conformity, and there is a special Action for the Plaintiff in that Case : so this Verdict is against the Case, because it appears that the Action brought by him is false, and that he ought to have brought another Action upon the special matter of his Case, if any such by Law lye for him.

Secondly, The Jury find, that the Defendant's wife departed from him against his will, and lived from him, and that the Defendant, before the Wares were sold to his wife, did forbid the Plaintiff to trust his wife with any Wares. And that the Plaintiff, contrary to his Prohibition, did sell
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and deliver those Wares to the wife upon Credit; and I conceive, that this Prohibition doth so far bar, or bind the Plaintiff that he shall never have any Action against the Defendant for Wares sold and delivered to his wife, after he was prohibited by the husband. It is agreed by all, that a Feme Covert cannot generally make any Contract, which shall charge or discharge her husband, without the authority or consent of the husband, precedent or subsequent: so that the authority or consent of the husband, is the foundation or ground which makes the contract good against him: but when the husband forbids a particular person to trust his wife, this Prohibition is an absolute revocation or countermand as to the person of the general authority which the wife had before, and puts him in the same plight as if the wife had never any authority given her.

It is said by my Brother Twisden and Tyrrell, that the Prohibition of the husband is void, for (says Tyrrell) the husband is bound to maintain his wife, notwithstanding her departure from him, and therefore he cannot prohibit others to do it.

And Twisden says it is a right vested in her by the Law, and therefore the prohibition of the husband shall not divest, or take it away from her.

I have already answered and disproved these Reasons on which they ground their Opinions, and will not repeat them here again: but admit that the husband were by Law bound to maintain his wife, notwithstanding her departure from him against his will, and that the Law doth give her, or best a Right in the wife to bind or charge the husband by her contract for necessary Apparel; will this be a good consequence thereupon; Therefore the husband cannot forbid this or that particular person to trust his wife?

A Man makes a Feoffment in fee, upon condition that the Feoffee shall not alien, this Condition is void, Litt. Sect. 360. Were it not a strange conclusion to say thereupon; If a Man makes a feoffment in fee, upon Condition that the feoffee shall not alien to J. S. that this Condition is likewise void?

The Reason given by Littleton why the Condition is void in the former, and not in the latter part of this second Case,

Case, is applicable to our Case ; namely, the Condition in the first Case, ousts the Feoffee of all the power which the Law gives unto him, which should be against reason, and therefore the same is void ; but in the latter Case the Condition doth not take away all the power of aliening from the Feoffee, and therefore it is good : so in our Case, if the Prohibition were so general, that the wife were thereby disabled altogether to Cloath her self, peradventure it might be reasonable to say, that the Prohibition was void ; but it being a restriction only to one particular person, there is no colour to say, that it is not good.

'Tis true (as my Brother Tyrrell says) that I cannot discharge others to deal with my wife, although I may forbid my wife to deal with them ; but it follows not thereupon, but that my Prohibition to a particular person doth make his dealing with, or trusting my wife, to be at his own Peril, so that he shall not charge me thereby in an Action ; as in case of a Servant, who buys Provision for my Household by my allowance ; If I forbid a Butcher or other Victualler, to sell to my Servant without ready Money, and he delivers Meat to my Servant afterwards upon trust, it is at his Peril, he shall have no Action against me for it.

It appears not by this Declaration or Verdict, that the Defendant's wife did want Apparel, that She ever desired her husband to supply her therewith, that he refused to allow her what was fit, that the Wares sold to her by the Plaintiff were for necessary Apparel, or of what nature or price the Wares were ; so that the Court may Judge of the necessity or fitness thereof : but only that the Plaintiff did sell and deliver upon credit divers of the Wares mentioned in the Declaration, unto the Wife (whereas none are mentioned therein) for 43 l. that this was a reasonable price for these Wares, and the same Wares were necessary for her, and suitable to the degree of her Husband ; and for these Reasons the Defendant ought to have Judgment in this particular Case against the Plaintiff, be the Law what it will in general.

I will conclude all as the seven' Princes of Persia (who knew Law and Judgments) did in the Case of Queen Vasthi, Esther 1. Cap.

This Deed that this Woman hath

hath done, in departing from her Husband against his will, and taking of Clothes upon trust, contrary to his Prohibition, shall come abroad to all women; and if it shall be repeated that her Husband (by the Opinion of the Judges) must pay for the Wares which she so took up, whilst she lived from him, then shall their Husbands be despised in their Eyes. But when it shall be known throughout the Realm, that the Law doth not charge the Husband in this case, all the Wives shall give to their Husbands honour, both great and small.

Judgment for the Defendant, Tyrrell, Twisden and Mallet dissenting.

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Term. Trin. 29 Car. II. 1677. in B. R.

The Earl of Shaftsbury's Case.

See also Trials 610, 1. Brown. 453.

(I.)
3 Keb. 792.

HE was brought to the Bar upon the Return of an Habeas Corpus directed to the Constable of the Tower of London. The effect of the Return was, that Anthony Earl of Shaftsbury, in the Writ mentioned, was committed to the Tower of London, 16 Feb. 1676. by virtue of an Order of the Lords Spiritual and Temporal in Parliament assembled; the tenor of which Order followeth in these Words; Ordered by the Lords Spiritual and Temporal in Parliament assembled, That the Constable of his Majesties Tower of London, his Deputy or Deputies, shall receive the Bodies of James Earl of Salisbury, Anthony Earl of Shaftsbury, and Philip Lord Wharton, Members of this House, and keep them in safe custody within the said Tower, during his Majesties pleasure, and the pleasure of this House, for their high Contempt committed against this House; And this shall be a sufficient Warrant on that behalf. To the Constable, &c. John Brown Cler' Parl.

The Earl of Shaftsbury's Counsel prayed that the Return might be filed; and it was so; And Friday following appointed for the debating of the sufficiency of the Return; and in the mean time, directions were given to his Counsel to attend the Judges and the Attorney-General, with their Exceptions to the Return; and my Lord was remanded till that day: And it was said, that though the Return was filed, the Court could remand or commit him to the Marshal at their Election.

Argument of Williams And on Friday the Earl was brought into Court again, and his Counsel argued the insufficiency of the Return. Williams said, That this Cause was of great consequence, in regard the King was touched in his Prerogative, The Sub-
after W. Sir W. Williams speaker of Commons
latter end of

Subject in his Liberty, and this Court in its Jurisdiction.

The cause of his Commitment (which is returned) is not sufficient, for the general allegation, of high Contempts, is too uncertain; for the Court cannot judge of the Contempt, if it doth not appear in what act it is. Secondly, It is not shewed where the Contempt was committed, and in favour of Liberty it shall be intended they were committed out of the House of Peers. Thirdly, The time is uncertain, so that peradventure it was before the last Act of general Pardon, 1 Roll 192, 193. and 219. Russel's case. Fourthly, It doth not appear whether this Commitment were on a Conviction, or an Accusation only; It cannot be denied, but that the Return of such Commitment by any other Court, would be too general and uncertain, Moor 839. Astwick was bailed on a Return, Quod commissus fuit per mandatum Ni. Bacon, Mil. Domini Custodis magni Sigilli Angliæ virtute cujusdam Contempt' in Curia Carcellariæ fact'; and in that book it appears, that divers other persons were bailed on such general Returns, and the cases have been lately affirmed in Bushell's case, reported by the Lord Chief Justice Vaughan where it is expressly said (that on such Commitment and Returns, being too general and uncertain) the Court cannot believe in an implicate manner, that in truth the Commitment was for causes particular and sufficient: Vaughan's Rep. 14. accord. 2 Inst. 52, 53, 55. and 1 Roll. 218. And the Commitment of the Jurors was for acquitting Pen and Mead, contra plenam & manifestam Evidentiam; and it was resolved to be too general, for the Evidence ought to appear as certain to the Judge of the Return, as it appeared before the Judge authorized to Commit: Russel's case 137. Now this Commitment (being by the House of Peers) will make no difference: for Parliament Br. in all cases where a matter comes in Judgment before this Court, let the question be of what nature it will, the Court is obliged to declare the Law, and that without distinction, whether the question began in Parliament or no. In the case of Sir George Binion in C. B. there was a long debate, whether an Original might be filed against a Member of Parliament during the time of privilege; and it was urged, that it being during the Sessions of Parliament, the determination of the question did belong to the Parliament. But it was resolved, an Original might be filed; and Bridgman then

then being Chief Justice, said, That the Court was obliged to declare the Law in all cases that come in Judgment before them. Hill. 24 E. 4. Rot. 4. 7. & 10. in Scacc^o in Debt by Rivers *versus* Cousin. The Defendant pleads, he was a Servant to a Member of Parliament, and ideo capi seu arrest^o non debet; and the Plaintiff prays Judgment, and quia videtur Baronibus quod tale habetur privilegium quod magnates, &c. et eorum familiares capi seu arrestari non debent, Sed nullum habetur privilegium quod non debent implacitari, Ideo respondeat oustr^o. So in Treymiard's case, a question of privilege was determined in this Court, Dyer 60. In the 14 E. 3. in the case of Sir John and Sir Geoffrey Staunton, (which was cited in the case of the Earl of Clarendon, and is entred in the Lords Journal) an Action of Waste depended between them in the Common-Pleas, and the Court was divided, and the Record was certified into the House of Parliament, and they gave direction that the Judgment should be entred for the Plaintiff. Afterwards, in a Writ of Error brought in this Court, that Judgment was reversed notwithstanding the Objection, That it was given by Order of the House of Lords, for the Court was obliged to proceed according to the Law in a matter which was before them in point of Judgment.

The constitution of all Acts of Parliament is given to the Courts at Westminster. And accordingly they have adjudged of the Validity of Acts of Parliament. They have searched the Rolls of Parliament, Hob. 109. Lord Hundsons case. They have determined whether the Journals be a Record, Hob. 110. When a point comes before them in Judgment, they are not foreclosed by any Act of the Lords. If it appears that an Act of Parliament was made by the King and Lords, without the Commons, that is Felo de se, and the Courts of Westminster do adjudge it void; 4 H. 7. 18. Hob. 111. and accordingly they ought to do. If this Return contains in it that which is fatal to it self, it must stand or fall thereby. It hath been a question often resolved in this Court, when a Writ of Error in Parliament shall be a Superedeas. And this Court hath determined what shall be said to be a Session of Parliament, 1 Roll 29. and if the Law were otherwise, there would be a failour of Justice. If the Parliament were Dissolved, there can be no question, but the Prisoner should be discharged on a Habeas Corpus; and yet then the Court must examine the cause of his Commitment: and by consequence a matter

matter Parliamentary. And the Court may now have cognisance of the matter as clearly as when the Parliament is Dissolved. The party would be without remedy for his Liberty, if he could not find it here; for it is not sufficient for him to procure the Lords to determine their pleasure for his Imprisonment, for before his enlargement he must obtain the pleasure of the King to be determined, and that ought to be in this Court, and therefore the Prisoner ought first to resort hither.

Let us suppose (for it doth not appear on the Return, and the Court ought not to enquire of any matter out of it) that a supposed contempt was a thing done out of the House, it would be hard for this Court to remand him. Suppose he were committed to a Foreign prison during the pleasure of the Lords, no doubt that would have been an illegal Commitment against Magna Charta, and the Petition of Right. There the Commitment had been expressly illegal; and it may be this Commitment is no less: For if it had been expressly shewn, and he be remanded, he is committed by this Court, who are to answer for his Imprisonment.

But secondly, The duration of the Imprisonment, during the pleasure of the King and of the House, is illegal and uncertain; for since it ought to determine in two Courts, it can have no certain period. A Commitment until he shall be discharged by the Courts of Kings-Bench and Common-Pleas is illegal; for the Prisoner cannot apply himself in such manner, as to obtain a discharge. If a man be committed till further Order, he is bailable presently; for that imports till he shall be delivered by due course of Law, and if this Commitment have not that sense, it is illegal; for the pleasure of the King is that which shall be determined according to Law in his Courts; as where the Statute of Westm' 1. cap. 15. declares, that he is not replevisable, who is taken by command of the King, it ought to extend to an extrajudicial command, not in his Courts of Justice, to which all matters of Judicature are delegated and distributed, 2 Inst. 186, 187.

Wallop to the same purpose; he cited Bushell's case, Vaughan's Rep. 137. that the general Return for high Contempts was not sufficient; and the Court that made the Commitment in this case, makes no difference; for otherwise one may be

imprisoned by the House of Peers unjustly for a matter relievable here, and yet shall be out of all relief by such a Return; for upon a supposition, that this Court ought not to meddle where the person is committed by the Peers, then any person, at any time, and for any cause, is to be subject to perpetual Imprisonment at the pleasure of the Lords. But the Law is otherwise; for the House of Lords is the supreme Court, yet their Jurisdiction is limited by the Common and Statute Law; and their excesses are examinable in this Court; for there is great difference between the errors and excesses of a Court, between an erroneous proceeding, and a proceeding without Jurisdiction, which is void, and a meer nullity; 4 H. 7. 18. In the Parliament, the King would have one Attaint of Treason, and lose his Lands, and the Lords assented, but nothing was said of the Commons; wherefore all the Justices held that it was no Act, and he was restored to his Land: and without doubt in the same case, if the party had been imprisoned, the Justices must have made the like resolution, that he ought to have been discharged.

It is a Sollecism, that a man shall be imprisoned by a limited Jurisdiction; and it shall not be examinable whether the cause were within their Jurisdiction or no. If the Lords without the Commons should grant a Tax, and one that refused to pay it should be imprisoned, the Tax is void; but by a general Commitment the party shall be remediless, So if the Lords shall award a Capias for Treason or Felony: By these instances it appears, that their Jurisdiction was restrained by the Common Law; and it is likewise restrained by divers Acts of Parliament, 1 H. 4. cap. 14. No Appeals shall be made, or any way pursued in Parliament. And when a Statute is made, a power is implicitly given to this Court by the fundamental constitution, which makes the Judges Expositors of Acts of Parliament. And peradventure if all this case appeared upon the Return, this might be a case in which they were restrained by the Statute of 4 H. 8. c. 8. That all Suits, Accusements, Condemnations, Punishments, Corrections, &c. at any time from henceforth to be put or had upon any Member for any Bill, speaking or reasoning of any matters concerning the Parliament to be communed or treated of, shall be utterly void and of none effect.

Now it doth not appear but this is a correction or punishment imposed upon the Earl contrary to the Statute ; There is no question made now of the power of the Lords ; but it is only urged, that it is necessary for them to declare by virtue of what power they proceed ; otherwise the Liberty of every Englishman shall be subject to the Lords, whereof they may deprive any of them against an Act of Parliament ; but no usage can justify such a proceeding. *Ellismere's case of the Post-nati*, 19. The Duke of Suffolk was impeached by the Commons of High Treason and Misdemeanors, the Lords were in doubt whether they would proceed on such general Impeachment to imprison the Duke ; And the advice of the Judges being demanded, and their resolutions given in the negative, the Lords were satisfied ; This case is mentioned with design to shew the respect given to the Judges, and that the Judges have determined the highest matters in Parliament.

At a conference between the Lords and Commons 3 Aprilis, Car. 1. concerning the Rights and Priviledges of the Subject, It was declared and agreed, that no Freeman ought to be restrained or committed by command of the King, or Privy-Council, or any other (in which the House of Lords are included) unless some cause of the Commitment, Restraint or Detenior be set forth for which by Law he ought to be committed. &c. Now if the King (who is the Head of the Parliament) or his Privy Council (which is the Court of State) ought therefore to proceed in a legal manner ; this solemn resolution ought to end all Debates of this matter. It is true, 1 Roll 129. in *Russell's case*. Coke is of Opinion, that the Privy-Council may commit without shewing cause ; but in his more mature age he was of another Opinion : And accordingly the Law is declared in the Petition of Right, and no inconvenience will ensue to the Lords by making their Warrants more certain.

¹ Leon. 71.

² Leon. 175.

Smith argued to the same purpose, and said That a Judge cannot make a Judgment, unless the Fact appears to him on a Habeas Corpus : the Judge can only take notice of the Fact returned. It is lawful for any Subject that finds himself aggrieved by any Sentence or Judgment, to Petition the King in an humble manner for Redress ; And where the Subject is restrained of his liberty, the proper place for him to apply himself to, is this Court ; which hath the supreme power, as
to

to this purpose, over all other Courts; and an Habeas Corpus issuing here, the King ought to have an accompt of his Subjects: Roll tit. Habeas Corp. 69. Wetherlies case. And also the Commitment was by the Lords; yet if it be illegal, this Court is obliged to discharge the Prisoner, as well as if he had been illegally imprisoned by any other Court. The House of Peers is an high Court, but the King's Bench hath ever been entrusted with the Liberty of the Subject, and if it were otherwise (in case of of Imprisonment by the Peers) the power of the King were less absolute, than that of the Lords.

It doth not appear but that this Commitment was for breach of privilege; but nevertheless if it were so, this Court may give relief, as appears in Sir John Binion's case before cited; for the Court which hath the power to judge what is Privilege, hath also power to judge what is Contempt against Privilege. If the Judges may judge of an Act of Parliament, a fortiori they may judge of an Order of the Lords, 12 E. 1. Butler's case, where he in Reversion brought an Action of Waste, and died before Judgment, and his Heir brought an Action for the same Waste; and the King and the Lords determined that it did lye, and commanded the Judges to give Judgment accordingly for the time to come; this is published as a Statute by Poulton, but in Ryley 93. it appears, that it is only an Order of the King and the Lords, and that was the cause that the Judges conceived that they were not bound by it, but 39 E. 3. 13. and ever since have adjudged the contrary.

If it be admitted, that for breach of Privilege the Lords may commit, yet it ought to appear on the Commitment, that that was the cause; for otherwise it may be called a breach of privilege, which is only a refusing to answer to an Action, whereof the House of Lords is restrained to hold plea by the Statute 1 H. 4. And for a Contempt committed out of the House they cannot commit; for the word Appeal in the Statute extends to all Misdemeanors, as it was resolved by all the Judges in the Earl of Clarendon's case, 4 Julii, 1663.

If the Imprisonment be not lawful, the Court ought not to remand him to his wrongful Imprisonment, for that would be an act of Injustice to imprison him de novo: Vaughan, 156.

It doth not appear whether the Contempt was a voluntary act, or an omission, or an inadvertency, and he hath now suffered five months Imprisonment. False Imprisonment is not only where the Commitment is unjust, but where the deteynor is too long, 2 Inst. 53.

In this case, if this Court cannot give remedy, peradventure the Imprisonment shall be perpetual; for the King (as the Law is now taken) may Adjourn the Parliament for ten or twenty years.

But all this is upon supposition, that the Session hath continuance; but I conceive that by the King's giving his Royal Assent to several Laws which have been enacted, the Session is determined; and then the Order for the Imprisonment is also determined.

Brook, tit. Parliament 36. Every Session in which the King signs Bills, is a day of it self, and a Session of it self. 1 Car. 1. cap. 7. A special Act is made, that the giving of the Royal Assent to several Bills, shall not determine the Session; 'tis true, 'tis there said to be made for avoiding all doubts. In the Statute 16 Car. 1. cap. 1. there is a Proviso to the same purpose. And also 12 Car. 2. cap. 1. 11 R. 2. H. 12. By the Opinion of Coke 4 Inst. 27. the Royal Assent doth not determine a Session; but the Authorities on which he relies do not warrant his Opinion. For 1. In the Parliament Roll 1 H. 6. 7. it appears, that the Royal Assent was given to the Act for the Reversal of the Attainder of the Members of Parliament the same day that it was given to the other Bills; and in the same year, the same Parliament assembled again; and then it is probable the Members who had been attainted, were present, and not before; 8 R. 2. n. 13. is only a Judgment in case of Treason by virtue of a power reserved to them on the Statute 25 E. 3. Roll Parliament (7) H. 4. n. 29. and is not an Act of Parliament. 14 E. 3. n. 7. 8, 9. the Aid is first entered on the Roll, but upon condition that the King will grant their other Petitions. The inference my Lord Coke makes, that the Act for the Attainder of Queen Katherine, 33 H. 8. was passed before the determination of the Session, is an Error; for though she was executed during the Session, yet it was on a Judgment given against the Queen by the Commissioners of Oyer and Terminer, and the subsequent Act was only an Act of Confirmation; but Coke ought to be excused, for all his Notes and Papers were

were taken from him ; so that this Book did not receive his last hand : But it is observable, that he was one of the Members of Parliament, 1 Car. 1. when the special Act was passed. And afterwards the Parliament did proceed in that Session only, where there was a precedent agreement betwixt the King and the Houses. And so concluded, that the Order is determined with the Session, and the Earl of Shaftesbury ought to be discharged,

Ayres argued to the same effect, and said, that the Warrant is not sufficient ; for it doth not appear that it was made by the Jurisdiction that is exercised in the House of Peers ; for that is coram Rege in Parlamento : So that the King and the Commons are present in supposition of Law. And the Writ of Error in Parliament is, *Inspecto Recordo, nos de Consilio, advisamento Dominorum Spiritual' & Temporalium & Commun' in Parliament', præd' existen', &c.* It would not be difficult to prove, that anciently the Commons did assist there : And now it shall be intended that they were present ; for there can be no averment against the Record. The Lords do several acts as a distinct House ; as the debating of Bills, enquiring of Franchises and Privileges, &c. And the Warrant in this case (being by the Lords Spiritual and Temporal) cannot be intended otherwise, but it was done by them in their distinct capacity : And the Commitment being during the pleasure of the King and of the House of Peers, it is manifest that the King is principal, and his pleasure ought to be determined in this Court.

If the Lords should Commit a great Minister of State, whose advice is necessary for the King and the Realm, it cannot be imagined that the King should be without remedy for his Subject, but that he may have him discharged by his Writ out of this Court.

This present recess is not an ordinary Adjournment : for it is entered in the Journal, that the Parliament shall not be assembled at the day of Adjournment, but adjourned or prorogued till another day, if the King do not signify his pleasure by Proclamation.

Some other exceptions were taken to the Return.

First, That no Commitment is returned, but only a Warrant to the Constable of the Tower to receive him.

Second.

Secondly, The Return does not answer the mandate of the Writ; for it is to have the body of Anthony Earl of Shaftesbury, and the Return is of the Warrant for the imprisonment of Anthony Ashly Cooper Earl of Shaftesbury.

Maynard to maintain the Return. The House of Lords is the supreme Court of the Realm; 'Tis true, this Court is superiour to all Courts of ordinary Jurisdiction: If this Commitment had been by any inferiour Court, it could not have been maintained. But the Commitment is by a Court that is not under the comptroll of this Court, and that Court is in Law sitting at this time; and so the expressing of the Contempt particularly, is matter which continues in the deliberation of the Court: 'Tis true, this Court ought to determine what the Law is in every case that comes before them; and in this case, the question is only, whether this Court can judge of a Contempt committed in Parliament during the same Session of Parliament, and discharge one committed for such Contempt: When a question arises in an Action depending in this Court, the Court may determine it; but now the question is, whether the Lords have capacity to determine their own priviledges; and whether this Court can comptrol their determination, and discharge (during the Session) a Peer committed for Contempt. The Judges have often demanded what the Law is, and how a Statute should be expounded of the Lords in Parliament, as in the Statute of Amendments, 40 E. 3. 84. 6. 8 Co. 157, 158. a fortiori the Court ought to demand their Opinion when a doubt arises on an Order made by the House of Lords now sitting.

As to the duration of the Imprisonment, doubtless the pleasure of the King is to be determined in the same, Court where Judgment was given. As also to the determination of the Session, the Opinion of Coke is good Law, and the addition of Proviso's in many Acts of Parliament, is only in majorem cautelam.

Jones Attorney General, to the same effect. As to the uncertainty of the Commitment, it is to be considered, that this case differs from all other cases in two circumstances; First, the person, that is a Member of the House, by which

he is committed. I take it upon me to say, that the case would be different if the person committed were not a Peer.

Secondly, The Court that doth commit, which is a superiour Court to this Court; and therefore if the Contempt had been particularly shewn, of what Judgment soever this Court should have been as to that Contempt, yet they could not have discharged the Earl, and thereby take upon them a Jurisdiction over the House of Peers. The Judges in no age have taken upon them the Judgment of what is Lex & consuetudo Parliamenti; but here the attempt is to engage the Judges to give their Opinion in a matter whereof they might have refused to have given it, if it had been demanded in Parliament. This is true, if an Action be brought where privilege is pleaded, the Court ought to judge of it as an incident to the Suit, whereof the Court was possessed; but that will be no warrant for this Court to assume a Judgment of an original matter arising in Parliament. And that which is said of the Judges power to expound Statutes, cannot be denied; but it is not applicable in this case.

By the same reason that this Commitment is questioned, every Commitment of the House of Commons may be likewise questioned in this Court.

It is objected, That there will be a failure of Justice, if the Court should not discharge the Earl; but the contrary is true, for if he be discharged, there would be a manifest failure of Justice; for Offences of Parliament cannot be punished any where but in Parliament; and therefore the Earl would be delivered from all manner of punishment for his Offence, if he be discharged: For the Court cannot take Bail but where they have a Jurisdiction of the matter, and so delivered out of the hands of the Lords, who only have power to punish him.

It is objected, That the Contempt is not said to be committed in the House of Peers; but it may well be intended to be committed there; for it appears he is a Member of that House, and that the Contempt was against the House. And besides, there are Contempts whereof they have cognizance, though they are committed out of the House.

It is objected, That it is possible this Contempt was committed before the general pardon; but surely such Injustice should not be supposed in the Supreme Court; and it may well be supposed to be committed during the Session in which the
Com.

Commitment to Prison was. It would be great difficulty for the Lords to make their Commitments so exact and particular, when they are employed in the various affairs of the Realm; and it hath been adjudged on a Return out of the Chancery of a Commitment for a Contempt against a Decree, that it was good, and the Decree was not shewn.

The limitation of the Imprisonment is well; for if the King or the House determine their pleasure, he shall be discharged: for then it is not the pleasure of both that he should be detained; and the addition of these words (during the pleasure) is no more than was before imply'd by the Law: for if these words had been omitted, yet the King might have pardoned the Contempt, if he would have expressed his pleasure, under the Broad Seal. If Judgment be given in this Court, that one should be imprisoned during the King's pleasure, his pleasure ought to be determined by Pardon, and not by any act of this Court. So that the King would have no prejudice by the Imprisonment of a great Minister, because he could discharge him by a Pardon; the double limitation is for the benefit of the Prisoner, who ought not to complain of the duration of the Imprisonment, since he hath neglected to make application for his discharge in the ordinary way.

I confess by the determination of the Session, the Orders made the same Session are discharged; but I shall not affirm whether this present Order be discharged or no, because it is a Judgment: But this is not the present case; for the Session continues notwithstanding the Royal Assent given to several Bills, according to the Opinion of Cooke, and of all the Judges, Hutton 61, 62. Every Proviso in an Act of Parliament, is not a determination what the Law was before; for they are often added for the satisfaction of these that are ignorant of the Law.

Winington Solicitor General, to the same purpose; In the great case of Mr. Selden 5 Car. I. the Warrant was for notable Contempts committed against us and our Government, and stirring up Sedition; and though that be almost as general as in our case, yet no objection was made in that cause in any of the arguments, Rushworth's Collections 18, 19. in the Appendix. But I agree, that this Return could not have been maintained, if it were of an inferiour Court; but during the Session this Court can take no cognizance of the matter:

And the inconveniency would be great, if the Law were otherwise taken, for this Court might adjudge one way, and the House of Peers another way; which doubtless would not be for the advantage or liberty of the Subject; for the avoiding of this mischief, it was agreed by this whole Court in the case of Barnadiston and Soames, that the Action for the double Return could not be brought in this Court, before the Parliament had determined the right of the Election, lest there should be a difference between the Judgments of the two Courts.

When a Judgment of the Lords comes into this Court, (though it be of the reversal of a Judgment of this Court) this Court is obliged to execute it; but the Judgment was never examined or corrected here. In the case of my Lord Hollis it was resolved, that this Court hath no Jurisdiction of a misdemeanour committed in the Parliament; when the Parliament is determined, the Judges are Expositors of the Acts, and are intrusted with the lives, liberties and fortunes of the Subjects; And (if the Sessions were determined) the Earl might apply himself to this Court; for the Subject shall not be without place where he may resort for the recovery of his liberty; but this Session is not determined. For the most part the Royal Assent is given the last day of Parliament; as saith Plow. Partridge's case. Yet the giving of the Royal Assent doth not make it the last day of the Parliament, without a subsequent Dissolution or Prorogation. And the Court Judicially takes notice of Prorogations or Adjournments of Parliament, Cro. Jac. 111. *Ford versus Hunter*. And by consequence, by the last Adjournment, no Order is discontinued, but remains as if the Parliament were actually assembled, Cro. Jac. 342. Sir Charles Heydon's case; so that the Earl ought to apply himself to the Lords who are his proper Judges.

It ought to be observed, that these Attempts are *prima Impressionis*; and though Imprisonments for Contempts have been frequent by the one and the other House, till now no person ever sought enlargement here.

The Court was obliged in Justice to grant the Habeas Corpus, but when the whole matter being disclosed, it appears upon the Return, that the case belongs *ad aliud examen*, they ought to remand the party.

As to the limitation of the Imprisonment, the King may determine his pleasure by Pardon under the Great Seal, or Warrant

rant for his discharge under the Privy Seal, as in the case of Reniger & Fogassa, Plow. 20.

As to the Exception, that no Commitment is returned, the Constable can only shew what concerns himself, which is the Warrant to him directed; and the Writ doth not require him to return any thing else.

As to the Exception, that he is otherwise named in the Commitment than in the Writ, the Writ requires the body of Anthony Earl of Shaftesbury, quocunque nomine Censeatur in the Commitment.

The Court delivered their Opinion: and first Sir Thomas Jones Justice said, such a Return made by an ordinary Court of Justice, would have been ill and uncertain; but the case is different when it comes from this high Court, to which so great respect hath been paid by our Predecessors, that they deferred the determination of doubts conceived in an Act of Parliament, until they had received the advice of the Lords in Parliament. But now instead thereof, it is demanded of us to controvert the Judgment of all the Peers given on a Member of their own House, and during the continuance of the Session. The cases where the Courts of Westminster have taken cognizance of Privilege, differ from this case; for in those it was only an incident to a case before them which was of their cognizance; but the direct point of the matter now, is the Judgment of the Lords.

The course of all Courts ought to be considered; for that is the Law of the Court, Lane's case 2 Rep. And it hath not been affirmed that the usage of the House of Lords hath been to express the matter more punctually on Commitments for Contempts; And therefore I shall take it to be according to the course of Parliament. 4 Inst. 50. it is said, that the Judges are Assistants to the Lords to inform them of the Common Law, but they ought not to judge of any Law, Custom or usage of Parliament.

The objection as to the continuance of the Imprisonment hath received a plain answer; for it shall be determined by the pleasure of the King, or of the Lords; and if it were otherwise, yet the King could pardon the Contempt under the Great Seal, or discharge the Imprisonment under the Privy Seal. I shall not say what would be the consequence (as to this Imprisonment) if the Session were determined,

ned, for that is not the present case ; but as the case is this Court can neither Bail nor discharge the Earl.

Wylde Justice, The Return no doubt is illegal ; but the question is on a point of Jurisdiction, whether it may be examined here ; this Court cannot intermeddle with the transactions of the high Court of Peers in Parliament during the Session, which is not determined ; and therefore the certainty or uncertainty of the Return is not material, for it is not examinable here ; but if the Session had been determined, I should be of Opinion that he ought to be discharged.

Rainsford Chief Justice, This Court hath no Jurisdiction of the cause, and therefore the form of the Return is not considerable ; we ought not to extend our Jurisdiction beyond its due limits, and the Actions of our Predecessors will not warrant us in such Attempts ; The consequence would be very mischievous, if this Court should deliver the Members of the Houses of Peers and Commons who are committed ; for thereby the business of the Parliament may be retarded ; for perhaps the Commitment was for evil behaviour, or undecent Reflections on the Members, to the disturbance of the affairs of Parliament.

The Commitment in this case is not for safe custody, but he is in Execution on the Judgment given by the Lords for the Contempt ; and therefore if he be bailed, he will be delivered out of Execution ; because for a Contempt in facie Curiae, there is no other Judgment or Execution. This Court hath no Jurisdiction of the matter, and therefore he ought to be remanded : And I deliver no Opinion, if it would be otherwise in case of Prorogation.

Twisden Justice was absent ; but he desired Justice Jones to declare, that his Opinion was, that the party ought to be remanded.

And so he was remanded by the Court.

Term. Trin. 26 Car. II. 1674. in B. R.

Pybus *versus* Mitford. *Ante* 121. pl. 27.

This case having been several times argued at the Bar, received Judgment this Term. The case was, Michael Mitford was seised of the Lands in question in Fee, and had Issue by his second wife Ralph Mitford; and 23 Jan' 21 Jac. by Indenture made between the said Michael of the one part, and Sir Ralph Dalivell and others of the other part, he covenanted to stand immediately seised after the date of the said Indenture (amongst others) of the Lands in question, by these words, viz. To the use of the Heirs Males of the said Michael Mitford, begotten or to be begotten on the body of Jane his wife, the Reversion to his own right Heirs; after which Michael dyed, leaving Issue Robert his Son and Heir by a first Venter, and the said Ralph by Jane his second wife; after the death of Michael, Robert entred, and from Robert by divers Mesne Conveyances a Title was deduced to the Heir of the Plaintiff; Ralph had Issue Robert the Defendant. And in this special Verdict the question was, If any Use did arise to Ralph by this Indenture 23 Jan' 21 Jac? Hales, Rainsford and Wyld, (against the Opinion of Twissden) Michael Mitford took an Estate for life by implication and consequence, and so had an Estate Tail. Hales (1) said it were clear if an Estate for life had been limited to Michael, and to the Heirs males of the body of Michael to be begotten on the body of his second wife; that had been an Estate Tail. (2) Which way soever it be, the Estate is lodged in Michael during his life. (3) There is a great difference between Estates to be conveyed by the rules of the Common Law, and Estates conveyed by way of Use: for he may mould the Use in himself in what estate he will. These things being premised, he said, This Estate being turned by operation of Law

(2.)

2 Mod. Rep.

209.

1 Vent. 372.

2. Hales, Rainsford, Wyld.

Post. 237.
Co. Lit. 22. a.

Law into an Estate in Michael, is as strong as if he had limited an Estate to himself for life. (2) A Limitation to the Heirs of his body, is in effect a Limitation to the Use of himself; for his Heirs are included in himself. (3) It is perfectly according to the intention of the party, which was, that his eldest Son should not take, but that the Issue of the second wife should take.

1. Object. His intent appears to be, that it should take effect as a future use.

Respons.

1 Vent. 379.

When a man limits a Use to commence in futuro; and there is such a descendible quality left in him, that his Heirs may take in the mean time, there it shall operate solely by way of future Use; as if a man Covenant to stand seized to the use of J. S. after the expiration of 40 years, or after the death of J. D. there no present alteration of the Estate is made, but it is only a future use, because the Father or the Ancestor had such an Interest left in him which might descend to his Heir; viz. during the years, or during the life of J. D. But when no Estate may by reason of the Limitation descend to the Heir until the Contingency happen, there the Estate of the Covenantor is moulded to an Estate for life.

2. Object.

Respons.

This would be to create an Estate by implication.

We are not here to create an Estate, but only to qualify an Estate which was in the Ancestor before.

3. Object.

Respons.

That the old Fee-simple shall be left in him.

Yet the Covenantor had qualified this Estate, and converted it into an Estate Tail, viz. part of the old Estate.

4. Object.

That the intention of the parties appears that it should operate by way of future use; for that of other Lands he covenanted to stand seized to the use of himself, and his Heirs of his body.

Respons.

It is not the intention of the party that shall controul the operation of Law; and to the case 1 Inst. 22. though it be objected that it was not necessary at the Law to raise an Estate for life by implication, yet my Lord Coke hath taken notice what he had said in the case of Parnell and Fenn, Roll Rep. 240. if a man make a Feoffment to the use of the Heirs of his

his Body, that is, an Estate for Life in the Feoffor, and in Englefield's Case, as it is Reported in Moor 303. It is agreed, that if a Man Covenanted to stand seised to an Use to commence after his death, that the Covenantor thereby is become seised for life.

As to the second Point, Twifden, Rainsford, and Wyld, held, that no future use would arise to Ralph, because he is not heir at Common Law, and none can purchase by the name of heir, unless he be heir at Common Law; but Hales was against them in this point, and he held, that if Ralph could not take by Descent, he might well take by Purchase, (1.) Because before the Statute de Donis, a Limitation might be made to his heir, and so he was a special heir at Common Law. (2.) It is apparent that he had taken notice that he had an heir at the Common Law, Litt. Sect. 35. 1 Inst. 22. So his intent is evident, that the heir at the Common Law should not take. But on the first Point, Judgment was given for the Defendant.

1 Co. 103. b.
Hob. 31.
Co. L. 24.
Post. 238.

Vent. 381, 382.

THE HISTORY OF THE

In the year of our Lord one thousand six hundred and
fifty and three, the first of January, the
city of London was visited with a
great frost, and the river of Thames
was so frozen, that many thousands
of people went upon the ice, and
many of them were killed. The
frost continued for many days,
and the people were much
troubled. The king, James the
first, was at that time in the
city, and he was much
troubled with the frost. He
went to the Tower, and he
was there for many days.
The frost was so great, that
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Term. Mich. 25 Car. II. in Communi Banco.

Anonymus.

If a Man be lyable to pay a yearly Sum, as Treasurer to a Church, or the like, to a Sub-Treasurer, or any other, and dies, the Money being in Arrear, an Action of Assumpsit cannot be maintained against his Executors for these arrears. For although, according to the resolution in Slade's Case, 4 Report, (which Vaughan Chief Justice said, was a strange resolution) an Assumpsit or an Action of Debt is maintainable upon a Contract, at the Parties Election, yet where there is no Contract, nor any personal privity, as in this case there is not, an Assumpsit will not lye. And in an Action of Debt for these Arrears, the Plaintiff must aver, that there is so much Money in the Treasury, as he demands; and in this Case of an Action against Executors, that there was so much at the time of the Testator's death, &c. for the Money is due from him as Treasurer, and not to be paid out of his own Estate. As in an Action against the King's Receiver, the Plaintiff must set forth, that he hath so much Money of the King's in his Coffers. (1.)
Assumpsit,
1 Cro. 545.

Magdalen College Case.

Indebitar' Assumpsit against the President and Scholars of Magdalen College in Oxford for threescore pounds due for Butter and Cheese sold to the College. The Chancellor of the University demanded Conisants by virtue of Charters of Priviledges granted to the University by the King's Progenitors, and confirmed by Act of Parliament; whereby, amongst other things, power is given them to hold Plea in personal Actions, wherein Scholars or other priviledged persons are (2.)
Conisants.

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P 2 con-

concerned, and concludes with an express demand of Conifance in this particular cause. Baldw. Their Priviledge extends not to this Case; for a Corporation is Defendant; and their Charters mention priviledged persons only. Their Charters are in derogation of the Common Law, and must be taken strictly. They make this demand upon Charters confirm'd by Act of Parliament: and they have a Charter granted by King Henry 8. which is confirmed by an Act in the Queens time; but the Charter of 11 Car. I. (which is the only Charter that mentions Corporations) is not confirm'd by any Act of Parliament, and consequently is not material, as to this demand. For a demand of Conifance is stricti Juris. But admitting it material, the King's Patent cannot deprive us of the benefit of the Common Law: and in the Vice-Chancellor's Court they proceed by the Civil Law. If you allow this demand, there will be a failure of Justice: for the Defendants being a Corporation, cannot be Arrested, they can make no Stipulation, the Vice-Chancellor's Court cannot issue Distringas's against their Lands, nor can they be excommunicated. Presidents we find of Corporations suing there as Plaintiffs (in which Case the afore mentioned inconvenience does not ensue) but none of Actions brought against Corporations.

Maynard contra. Servants to Colleges and Officers of Corporations have been allowed the privilege of the University; which they could not have in their own right: and if in their Masters right, a fortiori their Masters shall enjoy it. The word persona in the demand, will include a Corporation well enough.

Vaughan Chief Justice. Perhaps the Words atque confirmat', &c. In the demand of Conifance, are not material: for the priviledges of the University are grounded on their Patents, which are good in Law, whether confirm'd by Parliament, or not. The word persona does include Corporations: 2 Inst. 536. per Coke, upon the Statute of 31 Eliz. cap. 7. of Cottages and Inmates. A demand of Conifance is not in derogation of the Common Law: for the King may by Law grant tenere placita: though it may fall out to be in derogation of Westminster-Hall. Nor will there be a failure of Justice: for when a Corporation is Defendant, they make them give Bond, and put in Stipulators, that they will satisfy the Judgment; and if they do not perform the Condition of their Bond;

Bond, they commit their Bail. They have enjoyed these Privileges some hundreds of years ago. The rest of the Judges agreed, that the University ought to have Conisance. But Atkyns objected against the form of the demand, that the word *persona privilegiata* cannot comprehend a Corporation in a demand of Conisance, howsoever the sense may carry it in an Act of Parliament. Ellis and Wyndham. If neither Scholars, nor privileged Persons had been mentioned, but an express demand made of Conisance in this particular cause, it had then been sufficient; and then a fault, if it be one, in Surplusage, and a matter that comes in by way of Preface, shall not hurt. Atkyns. It is not a Preface, they lay it as the foundation and ground of their claim. The demand was allowed as to matter and form.

Rogers & Danvers.

DEbt against S. Danvers and D. Danvers, Executors of G. Danvers, upon a Bond of 100 l. entred into by the Testator. The Defendants pleaded that G. Danvers the Testator had acknowledged a Recognisance in the nature of a Statute Staple, of 1200 l. to J. S. and that they have no Assets, ultra, &c. The Plaintiff replied, that D. Danvers, one of the Defendants was bound together with the Testator in that Statute, to which the Defendants demur. (3.)
Assets.

Baldwin pro Defendente. If this Plea were not good, we might be doubly charged. It is true, one of us acknowledged the Statute likewise; but in this Action we are sued as Executors. And this Statute of 1200 l. was joynt and several; so that the Conisee may at his Election, either sue the surviving Conisor, or the Executors of him that is dead: so that the Testators Goods that are in our hands, are lyable to this Statute. It runs, *concesserunt se & utrumque eorum*: if it were joynt, the charge would survive; and then it were against us. It is common for Executors upon plainment administer pleaded, to give in Evidence payment of Bonds, in which themselves were bound with the Testator: and sometimes
such

such persons are made Executors for their security. The Opinion of the Court was against the Plaintiff; whereupon he prayed leave to discontinue, and had it.

Amie & Andrews.

(4.)
Considera-
tion.

21 Jac. 20.

A Sumpsit. The Plaintiff declares, that whereas the Father of the Defendant was indebted to him in 20 l. for Halt sold, and promised to pay it, that the Defendant, in consideration that the Plaintiff would bring two Witnesses before a Justice of Peace, who upon their Oaths should depose that the Defendant's Father was so indebted to the Plaintiff, and promised payment, assumed and promised to pay the Money; then avers, that he did bring two Witnesses, &c. who did swear, &c. The Defendant pleaded non Assumpsit; which being found against him, he moved by Sergeant Baldwin in Arrest of Judgment, that the consideration was not lawful: because a Justice of Peace not having power to administer an Oath in this Case, it is an extrajudicial Oath, and consequently unlawful. And Vaughan was of Opinion, That every Oath not legally administered and taken, is within the Statute against prophane Swearing. And he said it would be of dangerous consequence to countenance these extra-judicial Oaths, for that it would tend to the overthrowing of Legal Proofs. Wyndham and Atkins thought it was not a prophane Oath, nor within the Statute of King James; because it tended to the determining of a Controversie. And accordingly the Plaintiff had Judgment.

Horton & Wilson.

A Prohibition was prayed to stay a Suit in the Spiritual Court, commenced by a Proctor for his Fees. Vaughan and Wyndham. No Court can better judge of the Fees that have been due and usual there, than themselves. Most of their Fees are appointed by constitutions Provincial, and they probe them by them. A Proctor lately libelled in the Spiritual Court for his Fees, and amongst other things, demanded a great fee for every Instrument that had been read in the cause: the Client pretended that he ought to have but 4 d. for all. They gave Sentence for the Defendant; the Plaintiff appealed, and then a Prohibition was prayed in the Court of Kings-Bench. The Opinion of the Court was, that the Libel for his Fees was most proper for the Spiritual Court: but that because the Plaintiff there demanded a customary fee, that it ought to be determin'd by Law, whether such a fee were customary or no: and accordingly they granted a Prohibition in that Case. It is like the Case of a Modus for Tythes: for whatever ariseth out of the Custom of the Kingdom, is properly determinable at Common Law. But in this Case they were of Opinion, that the Spiritual Court ought not to be prohibited: and therefore granted a Prohibition, quoad some other particulars in the Libel, which were of temporal cognizance, but not as to the Suit for Fees. Wyndham said, If there had been an actual Contract upon the Retainer, the Plaintiff ought to have sued at Law. Atkyns thought a Prohibition ought to go for the whole. Fees, he said, had no relation to the Jurisdiction of the Spiritual Court, nor to the Cause in which the Proctor was retained. No Suit ought to be suffered in the Spiritual Court, when the Plaintiff has a remedy at Law: as here he might in an Action upon the Case; for the Retainer is an implied Contract. A difference about the Grant of the Office of Register in a Bishops Court, shall be tried at Common Law, though the Subjectum circa quod be Spiritual: 2 Rolls 285. placito 45. and 2 Rolls 283. Wadworth and Andrews. Shall a Sir Clerk prefer a Bill in Equity for his Fees? but a Prohibition was granted, quoad, &c.

(5.)

Fees.

Glever

Glever *versus* Hynde, & alios.

(6.)

Incumbent.
In 1 Mar. 1.
Stat. 2. cap. 3.
Exp. 8.

G Lever brought an Action of Trespass of Assault and Battery against Elizabeth Hynde and six others; for that they at York-Castle in the County of York, him the said Plaintiff with force and arms did assault, beat and evil entreat, to his damage of 100 l. The Defendants plead to the Vi & armis, Not-Guilty: to the assault, beating and evil entreating, they say, that at such a place in the County of Lancaster, one Jackson a Curate was performing the Rites and Funeral Obsequies, according to the usage of the Church of England, over the Body of there lying dead, and ready to be buried: and that then and there the Plaintiff did maliciously disturb him; that they, the Defendants required him to desist, and because he would not, that they to remove him, and for the preventing of further disturbance, molliter ei manus imposuerunt, &c. quæ est eadem transgressio, absque hoc that they were Guilty of any Assault, &c. within the Courty of York, or any where else extra Comitatum Lancastriæ. The Plaintiff demurs. Turner pro Querente. The Defendants do not show that they had any Authority to lay hands on the Plaintiff; as that they were Constables, Church-wardens, or any Officers: nor do they justify by the Authority of any that were. If they had pleaded that they laid hands on him to carry him before a Justice of Peace, perhaps it might have alter'd the case. The Plaintiff here, if he be faulty, is liable to Ecclesiastical Censure; and the Stat. of Ph. & Ma. Ann. 1. cap. 3. provides a remedy in such cases. Jones contra. If the Statute of Ph. & Ma. did extend to this Case, yet it does not restrain other ways that the Law allows to punish the Plaintiff, or keep him quiet. Our Saviour himself has given us a President; he whipt Buyers and Sellers out of the Temple; which act of Buying and Selling was not so great an impiety, as to disturb the worship of God in the very act and exercise of it.

1 Mar. 1. St. 2.
cap. 3.

1 Eliz. 2. S. 9.
N. 3.

Court. The Statute of 1 P. & M. concerns Preachers only: But there is another Act made, 1 Eliz. that extends to all Men in Orders, that perform any part of such publick Service. But neither of these Statutes take away the Common Law. And at the Common Law any person there present might have re-
moved

moved the Plaintiff : for they were all concern'd in the Service of God, that was then performing ; so that the Plaintiff in disturbing it, was a Nusance to them all ; and might be removed by the same rule of Law that allows a man to abate a Nusance. Whereupon Judgment was given for the Defendant, Nisi causa, &c.

Anonymus.

Action sur le Case : The Plaintiff declares, that whereas the Testator of the Defendant was indebted to the Plaintiff at the time of his death in the sum of 12 l. 10 s. (7.)
 that the Defendant in consideration of forbearance, promised to pay him 5 l. at such a time, and 5 l. more at such a time after, and the other 50 shillings when he should have received money ; then avers, that he did forbear, &c. and saith, that the Defendant paid the two five pounds ; but for the 50 shillings residue, that he hath received money, but hath not paid it. The Defendant pleaded non Assumpsit, which was found against him. Wilmot moved in arrest of Judgment, that the Plaintiff doth not set forth how much money the Defendant had received, who perhaps had not received so much as 50 shillings ; he said, though the promise was general, yet the breach ought to be laid so, as to be adequate to the consideration. And secondly, that the Plaintiff ought to have set forth of whom the Defendant received the money, and when and where, because the receipt was traversable. The Court agreed, that there was good cause to demur to the Declaration : but after a Verdict they would intend, that the Defendant had received 50 shillings ; because else the Jury would not have given so much in damages : and for the other exception, they held, that the Defendant having taken the general issue, had waived the benefit thereof. Assumpsit.

Alford & Tatnell.

(8.)
Audita
Querela.

Gregory & Melchisedec Alford were bound jointly to Tatnell in a Bond of 700 l. the Obligee brought several Actions, and obtained two several Judgments in this Court against the Obligors; and sued both to an Outlawry. And in Mich. Term. 18 Car. 2. both were returned outlawed. In Hill. Term following, Gregory Alford was taken upon a Cap. utlagatum by Browne Sheriff of Dorset-shire; who voluntarily suffered him to escape. Tatnell brought an Action of Debt upon this escape against Browne, and recover'd and receiv'd satisfaction: notwithstanding which he proceeded to take Melchisedec Alford: who brought an Audita querela: and set forth all this matter in his Declaration; but upon a demurrer, the Opinion of the Court was against the Plaintiff for a fault in the Declaration, viz. because the satisfaction made to the Plaintiff by the Sheriff, was not specially pleaded, viz. time and place alledged where it was made, for it is issuable, and for ought appears by the Declaration, it was made after the Writ of Audita querela purchased, and before the Declaration. The Court said, if Tatnell had only brought an Action on the case against the Sheriff, and recovered damages for the escape, though he had had the damages paid, that would not have been sufficient ground for the Plaintiff here to bring an Audita querela; but in this case he recovered his Original debt in an Action of debt grounded upon the escape, which is a sufficient ground of Action, if he had declared well. They gave day to show cause, why the Declaration should not be amended, paying Costs.

Anonymus.

(9.)
Courts.

An Action of False Imprisonment, The Defendants justify by virtue of a Warrant out of a Court within the County Palatine of Durham; to which the Plaintiff demurred. The material part of the Plea was, That there was antiqua Curia tent. coram Vicecomite Comitatus, &c. vocat. The County

County Court, which was accustomed to be held de 15 diebus in 15 dies, and that there was a Custom, that upon a Writ of questus est nobis, issuing out of the County Palatine of Durham, and delivered to the Sheriff, &c. that upon the Plaintiffs affirming quendam querelam against such person or persons, against whom the questus est nobis issued, the Sheriff used to make out a Writ in the nature of a cap. ad satisfac. against him or them, &c. that such a Writ of questus est nobis issued ex Cur' Cancellarii Dunelm. which was delivered to the Sheriff, who thereupon made a precept to his Bayliffs to take the Plaintiff, who thereupon was arrested, which is the same imprisonment.

Serjeant Jones for the Plaintiff, took exceptions to this plea; as, 1. The Court is ill pleaded to be held coram Vicecomite; for in a County Court the suitors are Judges: Cr. Jac. 582. and though this Court holdeth plea upon a questus est nobis, which is the King's Writ; yet that doth not alter the nature of the Court, nor its Jurisdiction. Gentleman's case, 6 Rep. 11. 2. The Custom of holding this Court de quindecim diebus in quindecim dies, is void: being not only against Magna Cart. 35. but against the 2 & 3 Edw. 6. cap. 25. which enacts, That no County Court, &c. shall be longer deferred than one month from Court to Court, &c. any Usage, Custom, Statute or Law to the contrary notwithstanding. 3. He took these exceptions to the Custom; 1. It is absurd, that if upon a questus est nobis, the party affirm quendam querelam, that then, &c. for a questus est nobis is an Action upon the case, and this quendam querela may be in any other Action, though never so remote: the Plaintiff ought to be in pursuance of the Writ, and so to have been pleaded. 2. As this Custom is laid, it does not appear, that the Plaintiff ought to arise within the Jurisdiction of the Court. 3. It is against the Law, that in any inferiour Court a Capias should be awarded before Summons. 1 Rolls 563. Seaburn & Savaker. 2 Rolls 277. placit' 2 Pasch. 16 Jac. Bankes & Pembleton. The 4th exception to the Declaration was, that it does not appear whether this Writ were purchased out of the Chancery of the City of Durham, or of that of the County: the words ex Cur. Cancellar. Dunelm. are applicable to either. 5. Here is not an averment, that the cause of Action did arise within the County Palatine: it is said indeed, that he was indebted, and did assume within the County; but it is the contract and cause of the debt that entitles the Court there

there to the Action. 6. He says, that he did levare quandam querelam; but does not say that it was super brevi de questus est nobis: nor that it was in placito prædict; nor makes any application at all of the plaint to the Writ: and then the plaint not appearing to be warranted by the Writ, and being for abode 40 shillings, the proceedings are coram non Judice.

7. The Sheriffs Warrant is to Arrest *si inventus fuerit in balliva tua*: and it does not appear that the Bayliff had any Bayliff. If the County were divided into several divisions, and each Bayliff allotted to a several division, this ought to have been shown; and that the place where this Arrest was made, was within this Bayliffs proper division.

8. Of the Defendants own shewing, the Court was not held according to the Custom alledged, viz. de quindecim diebus in 15 dies: for the last Court is said to have been held the 12th of March, and the next after that on the 26th. Turner for the Defendant arугed, that the imprisonment was lawful. To the first exception he said, that the Court mention'd in the bar, is not a County Court, nor so pleaded: it is pleaded as it is, Cur' vocat. Cur' Comitatus; and there were never any Suitors known there to be Judges. It is not to be examined according to the rules of County Courts properly so called: for we plead it to be according of the Custom of the County Palatine of Durham, which is an exempt Jurisdiction. As for the exception to its being held de 15 diebus in 15 dies, the answer to the first exception answers this also. The Judges of Assize in Writs of false Judgment have allowed this Custom, and affirmed Judgments given in this Court: of which we have many Presidents. For the third exception, concerning the validity of the Custom; to the first exception against it, he answered, that a Bar is good enough, if it be to a common intent, and the common intent is, that the quædam querela must be pursuant to the questus est nobis: and in this case it was so; the questus est nobis, and the precept upon which the Plaintiff was arrested, are both in an Action of the case upon a promise. And to the second, that the cause of Action is shown to arise within the Jurisdiction; for promise, which is the ground of this Action, is said to have been made infra Comitatus Palatinus. To the third exception, that in inferior Courts it is illegal to award a Capias before Summons; but this Court is in a County Palatine (and such Courts are like to the Courts at Westminster, and have the same Authority: Rowlandson

landson & Symphon, 1 Rolls 801. placito 11. and the Customs of those Courts are as good Warrants for their proceedings, as the Custom of the Kings Bench is for their issuing Latitars. To the fourth, he said it was a foreign intendment, to suppose a Court of Chancery in the City of Durham; a Court of Equity cannot be by grant, and there is no prescription in the City of Durham, to hold plea in Equity. To the fifth, he said, the promise was laid to have been made within the Jurisdiction. To the sixth, *ut supra*. To the seventh, that this Precept was according to the form of all their Precepts in like cases. To the eighth, that taking both days inclusively, there are 15 days. But admitting that there were some defect in the proceedings, yet since that Court can issue such a Writ as this is, it is sufficient to excuse the Office: 10 Rep. the case of the Marshallsey.

Cur'. This is not a County Court, but a Court vocat' Cur' Com', and it is within a County Palatine; and for both those reasons not in the same degree with other County Courts. And though it were a County Court, it might by prescription be held before the Sheriff, as a Court Baron may by a special prescription be held coram Seneschallo, and so it hath been adjudged: In the case of Armyn & Appletoft, Cr. Jac. 382. there is no such special prescription as there ought to be, but a general prescription for a Court Baron, and every Court Baron must be prescribed for. The County Palatine of Durham is not of late standing, like that of Lancaster, but is immemorial: and a Custom there is of great Authority. As to the objection against quendam querelam; why it may not be as allowable for a man there to bring a questus est nobis, and declare in what plaint he will, as it is here to arrest a man and declare against him in any Action? But admitting the proceedings irregular, yet since the Court can issue a Capias, that excuses the Officer in this Action: and Judgment was given for the Defendant, Nisi causa, &c.

Term. Pasch. 26 Car. II. in Communi Banco

Brooking *versus* Jennings & alios.

(10.)
Executor.

The Plaintiff declared as Executor against the Defendants, as Executors also; they pleaded severally plene administravit. Upon one of the Issues a Special Verdict was found; viz. that the said Defendant being Executor durante min' etate of an Infant, had paid such and such Debts and Legacies, and had delivered over totum residuum status personalis of the Testator, to the Infant Executor, when he came of Age. Justice Atkyns. This special Verdict does not maintain the Defendants plea of fully administrated: for that cannot be pleaded, unless all Debts, &c. are discharged as far as the Assets will reach; which is not done here; for residuum status personalis is delivered over, &c. and that residuum is lyable to the payment of this Debt, which is yet undischarged. But Vaughan, Wyndham and Ellis held, that however an Executor dischargeth himself of the Estate that was the Testators, he may plead fully administrated: and that it is his safest plea.

It was found by the same Verdict, that the Testator left a personal Estate, to the value of 2000 l. that there were owing by him 500 l. in Debts upon Specialties, 500 l. more upon simple Contracts; and that he had disposed of 400 l. in Legacies: and that this Defendant was Executor durante minor' of the Testator's Son; that he had paid 1400 l. in discharge of the Debts and Legacies aforesaid; and had accounted with the Infant Executor, when he came of age, and that upon the payment of 91 l. to him, the Infant Executor released to him all Actions, &c. and whether upon this whole matter, this Defendant should be said to have administrated, was the question?

Vaughan. When an Infant Executor comes of age, the power of an Executor durante minore etate ceaseth; and the
new

new Executor is then lyable to all Actions: If the former Executor wasted, the new one hath his remedy against him; but he is not lyable to other mens Suits. Nor is there any inconvenience in this; for still, here is a person lyable to all Actions: It is objected, that possibly the new Executor is not of ability to satisfy: I answer; if in some particular case it fall out to be so, that is by accident: and to argue from the possibility of such an accident, is to suppose the Law fitted to answer all emergencies. Atkyns accorded.

Vaughan. It is said that here are 1500 l. lyable to pay this Debt: for to pay debts upon simple Contracts, or Legacies before it, is a devastavit: especially, the Defendant having notice of this Debt (which was also found.) That is a mistake, upon which some books run: but it is certainly no Law. Debts upon simple Contracts may be paid before Bonds, unless the Executors have timely notice given them of those Bonds; and that notice must be by Action. Atkyns and Ellis agreed with Vaughan. Wyndham dubitabat. The case was put off to be argued next Trinity Term: but in the mean time the Plaint discontinued.

Scudamore & Crossing. Exch. Chamber.

Ejectione firmæ. A special Verdict: It was found that a man by Deed did give and grant, bargain and sell, alien, enfeof and confirm to his daughter certain Lands: but no consideration of money is mention'd, nor is the Deed enroll'd; there is likewise no consideration of natural Affection expressed (other than what is implied in naming the Grantee his daughter) there is no Liberty enfeofed, nor any found to have been made; nor was the daughter in possession at the time of the Deed made. The question was, whether this were a void Deed, or had any operation at all in the Law, and what was wrought by it? In the King's Bench it was adjudged by the whole Court to be a good Deed, and that it carried the Estate to the daughter by way of covenant to stand seized. Upon a Writ of Error before the Justices of the Common-Pleas, and the Barons of the Exchequer, the case was argued at Serjeants Inn, by Sir William Jones against the Deed, and

(II.)

3 Keb. 754.

27 H. 8. c. 10.

1 Vent. 137. s. 2.

Q. 51: 394.

and by Sir Francis Winnington in maintenance of it.

Jones. Before the Statute of Uses, a man might either have retained the possession, and have departed with the use, or he might have departed with the possession, and have retained the use; or he might have departed with them both together. The Statute unites the possession to the use; but leaves men at liberty to convey their Estates by putting the possession out of themselves, and limiting an use; or by raising an use, and let the possession follow that. Now how shall it be known when an Estate must pass one of these ways, and when the other? That must appear by the intention of the party expressed in the Deed. Some Conveyances contain words that look both ways; some one way and some another. If the words look both ways, then has he, to whom the Estate is intended to be conveyed, election to take it whether way he likes best: Sir Rowland Hayward's case, 2 Co. Adams & Steer, 2 Cro. 210. so in Mich. 9 Jac. a man in consideration of money did grant, enfeoff, bargain and sell; and in the Deed there was a Letter of Attorney to make Livery; resolved, to be a good Conveyance by way of bargain and sale, if the deed were enrolled: 2 Rolls 787. Where the words are only proper to pass an Estate by way of use, there you shall never take an Estate at Common Law: Cro. Jac. 210. in Adams & Steer's case, Denton & Fettyplace's case, 30 Eliz. is there cited, that by the words of bargain and sale without Attornment, a Reversion passeth not. Vide ibid. 50. Dr. Atkins case: The King bargains and sells, &c. no use can rise, because the King cannot stand seized to an use: Moor 113. On the other side, where the words are proper to pass the Estate at Common Law, there nothing shall pass by way of use: Dyer 302. b. a Quare is there made, whether or no, if a man, in consideration of natural affection, &c. release to his Brother, who is not in possession; whether an use hereby ariseth to the releasor? but this Quare is resolved in a manuscript Report that I have of that case, viz. That no use does arise. He cited Ward & Lambert's case, Cr. Eliz. 394. & Osburn & Churchman's case, Cr. Jac. 127. which is the case in question. In Rolls second part fol. a man in consideration of marriage did give and grant to his wife after his decease, to her and the heirs of her body, &c. and it was resolved that nothing passed. This case is much stronger than ours: for there is but one way to make this good, viz. by raising an use:

2 Roll. 786,
787. pl. 25.

use: for as a Conveyance at Common Law, it cannot be good, because a Freehold cannot be granted to commence in futuro: and yet rather than recede from the words of the party, the deed was adjudged to be void. He cited Foster and Foster's Case Trin. 1659. which himself had argued. In the deed here in question there are words proper to pass an Estate in possession; give and grant. There is likewise a clause of warranty; of which the Grantee should lose the benefit in a great measure, if he were in the Poss; for then he shall not touch: and there are Opinions that he cannot rebut; as in Spirt and Bence's Case. There is also a Covenant, that after the sealing and delivery, and due execution of, &c. the party shall quietly enjoy, &c. now what execution can be meant but by Livery of Seisin? Fox's Case, 8 Rep. has been objected, in which 'tis resolved, that the Reversion in that case should pass by way of bargain and sale, though the words of grant were, demise, grant, let, and to Farm let; all words proper to a Common Law Conveyance: I answer the consideration of Money there expressed, is so strong a consideration, as to carry it that way; but the consideration of natural Affection is not so strong; and so the Cases are not alike: the consideration of money has been held so strong, as to carry an Estate of Fee-simple in an use, without words of Inheritance.

¹ Sid. 82.
¹ Keb. 160,
^{277.}
 Raymond 43;
^{44.}

Winnington contra. He insisted upon the intention of the party, the consideration of blood and natural affection, and the necessity of making this deed good by way of Covenant to stand seized, because it could not take effect any other way. The clause of warranty and covenant for quiet enjoyment, he said, were but forms of Conveyances, and words of Clerks: but the effectual words are those that contain the inducement of the party to make the Conveyance, and the words that pass the Estate: he cited Plowd. queries placito 305. Rolls 2 part, 787. placito 25. 1 Inst. 49. Poph. 49. in Foster's Case, which had been cited against him, he said, the deed was as unformal to pass the Estate one way as another. In Osburn and Churchman's Case, he said, this point was started, but that the resolution was not upon this point: it came in question neither upon a special Verdict, nor a Demurrer. Tibs and Purplewell's Case, 40 & 41 Eliz. Rolls 2 part 786, 787. answers all Objections against our Case, and is in form and substance the same with it. He cited one Saunders and Savin's case, adjudg'd in the

A a

late

late Times in the Common-Pleas, viz. That where a Man seized in fee of a Rent-charge, granted it to a Kinsman for Life, and the Grantor died before attornment, it was resolved, that upon the sealing and delivery of the Deed an Use arose. Wherefore he prayed that the Judgment might be affirmed.

Turner Chief Baron of the Exchequer. Turner and Littleton Barons, and Atkyns, Wyndham and Ellis Justices of the Court of Common-Pleas, were for affirming the Judgment. Vaughan Chief Justice of the Common-Pleas, and Thurland Puisne Baron, contra.

1 Keb. 162,

275.

1 Sid. 26.

1 Vent. 140.

See Holt.

11 Rep. 2. 113.

See also 2. W. 2. 22.

75.

Raymond 48.

See Holt.
11 Rep. 2. 113.
1283.

The six Judges argued, 1. That in a Covenant to stand seized, those Words of covenanting to stand seized to the Use of, &c. are not absolutely necessary, and that it is sufficient if there are words that are tantamount. 2. That no Conveyance admits of such variety of words, as does this of a Covenant to stand seized. 3. That Judges have always endeavoured to support Deeds, ut res magis valeat, &c. 4. That the Grantor in this Case by putting in plenty of words, shews that he did not intend to tie himself up to any one sort of Conveyance. 5. That if the words give and grant had been alone in the Deed, there would have been no question: and that if so, then utile per inutile non vitiatur. 6. That every Mans deed must be taken most strongly against himself. 7. That the words give and grant enure sometimes as a Grant, sometimes as a Covenant, sometimes as a Release: and must be taken in that sense which will best support the intent of the party. 8. That the very point of this Case has received two full determinations upon debate: and that it were a thing of ill consequence to admit of so great an uncertainty in the Law as now to alter it. 9. That there is here a clear intent that the Daughter should have this Estate, a Deed, a good consideration to raise a Use, and words that are tantamount to a Covenant to stand seized. Wherefore the Judgment was affirmed.

Thurland said, The intention of the party was not a sure rule to construe deeds by: that if Lands were given in conubio soluto ab omni servitio, the intent of the Giver is, to make a Gift in Frank-marriage; but the Common Law, that delights in certainty, will not understand his words so, because he does not say, in libero maritaggio: In our case, the first intent

tent of the Father was to settle the Land upon his Daughter; his second intent was to do it by such or such a Coveyance: what Coveyance he meant to do it by, we must know by his words: the words give and grant do generally and naturally work upon something in esse: strained constructions are not favoured in the Law. Nor ought Heirs to be disinherited by forced and strained constructions. If this Deed shall work as a Covenant to stand seized, it will be in vain to study forms of Coveyances; it is but throwing in words enough, and if the Lands pass not one way they will another. He cited Crook 279. Blitheman and Blitheman's Case. And 34 & 35 Dyer 55. he said Pitfield and Pierce's Case in March, was later than that of Tibs and Purplewell, and of better Authority.

Vaughan accordant. It is not clear that the words give and grant are sufficient to raise an Use; but supposing that they are by a forced Exposition, when nothing appears to the contrary; will it thence follow that they may be taken in a sense directly contrary to their proper and genuine sense, in such a place as this, where all the other parts of the deed are wholly inconsistent with, and will not by any possibility admit of such a construction? he mentioned several clauses in the deed, which he said were proper only to a Coveyance at Common Law. He appealed to the Law before the Statute of Uses; and said, that where an Use would not rise by the Common Law, there the Statute executes no possession; and that by such a deed as this no use would have risen at the Common Law: but the Judgment was affirmed. 1 Sid. 26.
2 Roll. 786.

Gabriel Miles *his Case.*

HE and his Wife recovered in an Action of Debt (12.) against one Cogan 200 l. and 70 l. damages: the Wife dies, and the Husband prays to have Execution upon this Judgment. The Court upon the first motion, enclin'd that it should not survive to the Husband; but that Administration ought to be committed of it, as a thing in Action: But this Term they agreed that the Husband might take out execution; and that by the Judgment Baron and Feme.

it became his own debt, due to him in his own right. And accordingly he took out a Scire facias: Beaumont and Long's Case, Cro. Car. 208. was cited.

Anonymus.

(13.)
Leases.

6 Co. 36. a.

The Plaintiff in an Ejectione firmæ declar'd upon a Lease made the 10th day of October, habend' from the 20th of November for five years. And the question upon a special Verdict was, whether this were a good or a void Lease? Serjeant Jones. There are many Cases in which the Law rejects the limitation of the commencement of a Lease, if it be impossible; as from the 31st of September, or the like: now this being altogether uncertain, and since there is nothing to determine your Judgments what November he meant, whether last past, or next ensuing, it amounts to an impossible limitation. Rolls, tit. Estate, placito 7. 849. ibid. placito 10. betwixt Elmes and Leaves. Baldwin contra. The Law will reject an impossible limitation, but not an uncertain limitation. Vaughan and Atkyns. The Law rejects an impossible limitation, because it cannot be any part of the parties agreement: but an uncertain limitation vitiates the Lease; because it was part of the Agreement: but we cannot determine it, not knowing how the Contract was. There are many Examples of Leases being void for uncertainty of commencements: which could not have been adjudged void, if the limitation in this case were good. Wyndham and Ellis contra. And that it should begin from the time of the delivery. It was moved afterward, and Ellis being absent, it was ruled by Vaughan and Atkyns against Wyndham's Opinion, and Judgment was arrested.

Fowle & Doble's Case.

Formedon in the Remainder. The Case was thus: There (14.)
 were three Sisters; the eldest was Tenant in Tail of a Non-te-
 fourth part of 140 Acres, &c. in three Mills, A. B. and C. the nure.
 Remainder in Fee-simple to the other two; the Tenant in
 Tail takes Husband Dr. Doble the Defendant. The Husband
 and wife levy a Fine sur Conizance de droit, to the use of them
 two, and the heirs of the body of the Wife, the Remainder in
 Fee to the right Heirs of the Husband, and this Fine was
 with warranty against them and the Heirs of the wife. The
 wife dies without issue, leaving the Husband, against whom
 Lucy and Ruth, the other two Sisters, to whom the Remain-
 der in Fee was limited, bring a Formedon in the Remainder.
 The Defendant, as to part of the Lands in demand, viz. 100
 Acres, pleaded Non-tenure, and that such a one was Tenant.
 To that Plea the Plaintiff demurred. As to the rest of the
 Lands, he pleaded this Fine with warranty. The Plaintiffs
 made a frivolous Replication, to which the Defendants de-
 murred. The Plaintiffs Counsel excepted to the Defendants
 Plea of Non-tenure; 1. That he doth not express in which of
 the Mills the 100 Acres lie: 5 Ed. 3. 140. in the old Print,
 184. and 33 H. 6. 51. Sir John Stanley's Case. But this was
 over-ruled: for the Formedon being of so many several Acres,
 he is not obliged to shew where those lie, that he pleads Non-
 tenure of: He tells the Plaintiff who is the Tenant, which
 is enough for him. 2. Because he that pleads Non-tenure in
 abatement, ought to set forth who was Tenant die impetrati-
 onis brevis orig. &c. But this was over-ruled also; for he says
 that himself was not Tenant die impetrationis brevis origin.
 but that such another eodem die was Tenant; which is certain
 enough. When the Tenant pleads Non-tenure to the whole,
 he need not set forth who is Tenant; otherwise when he
 pleads Non-Tenure of part: 11 H. 4. 15. 33 H. 6. 51. At the
 Common-Law, if the Tenant had pleaded Non-tenure as to
 part, it would have abated all the Writ: 36 H. 6. 6. but by
 the Statute of 25 Ed. 3. cap. 16. it was enacted, that by
 the exception of Non-tenure of parcel, no Writ should be aba-
 ted, but only for that parcel, whereof the Non-tenure was
 alledged. A third exception was taken to the pleading of the
 Fine,

fine, viz. because he pleaded a fine levied of a fourth part, without saying in how many parts to be divided. This was also over-ruled, and 1 Leon. 114. was cited; where a difference is taken betwixt a Writ and a fine: and in a fine it is said to be good, that being but a Common Assurance, aliter in a Writ: 19 Ed. 3. Fitz. bre. 244. This exception seems level'd against the Plaintiffs own Writ, in which he demands a fourth part, without saying in how many parts to be divided. The matter in Law was, whether or no this warranty, being against the husband and wife, and the heirs of the wife, were a bar to the Plaintiffs, or survived to the Husband; and it was resolved to be a bar; for this warranty as to the Husband, was destroyed as soon as it was created: the same breath that created it put an end to it; for the Husband warranted during his Life only, and took back as large an Estate as he warranted, which destroys his warranty: and this is Littleton's Text: If a Man make a feoffment in fee with warranty, and take back an Estate in fee, the warranty is gone. But the destruction of the Husband's warranty does not affect the wives: 20 H. 7. 1. and Sym's Case, upon which Ellis said he much relied. Herbert's Case 3 Co. can give no rule here; for that here the husband is seiz'd only in right of the wife.

Vaughan said, That if the fine in this case had been levied to a stranger for life, or in fee, who had been impleaded by another stranger; that in that case the Tenant ought to have vouched the surviving husband, as well as the Heir of the wife, or else he would have lost his warranty. 2. He said, if the fine had been levied to the use of a stranger, who had been impleaded by the heirs of the wife; he questioned whether or no the Tenant could have rebutted them for any more than a Moiety: and he questioned the Resolution of Sym's Case 8 Rep. there is a Case cited in Sym's Case out of the 45 Edw. 3. 23. which is expressly against the resolution of the Case: it is said in the Reports that no judgment was given in that Case, which is false; and that the Case is not well abridged by Brook, which is also false. If in Case of a Toucher, a Man loseth his warranty, that does not vouch all that are bound; why should not one that's rebutted have the like advantage? There's a Resolution quoted in Sym's Case out of 5 Edw. 2. Fitz. Tit. Garranty 78. upon which the Judgment is said to be founded, being, as is there said, a Case in point; but he conceived not: for Harvey, that gave the Rule, said;

1 Cro. 370.

8 Co. 51. Co.
Lit. 373. b.

said; le tenant poit barrer vous tous, ergo un sole: in the Case there were several co-heirs, and if all were demandants, all might have been barred: and if one be demandant, there's no question but she may be rebutted for her part. But Sym's Case is quite otherwise: for there one person is co-heir to the garranty, that is not heir to any part of the Land. In 6 Ed. 3. 50. there is a Case resolved upon the ground and reason of the 45 Ed. 3. For these Reasons he said he could not rely upon Sym's Case. He agreed with the rest to the Reason why the Warranty is destroyed, viz. because the Husband takes back as great an Estate as he warranted: for then no use can be made of the warranty. If a man that has Land, and another warrant this Land to one and his heirs, and one of them dye without heirs, the survivor may be vouched without question. The Husband never was obliged by this warranty; but as to him it was merely nominal: for from the very creation of it, it was impossible that it should be effectual to any purpose: he cited Hob. 24. in Rolls and Osburn's Case. The whole Court agreeing in this Opinion, Judgment was given for the Tenant.

Term. Trin. 26 Car. II. in Communi Banco.

Hamond *versus* Howell, &c.

(15.)
2 Mod.R. 218.
Supra 119. pl.
20.

Allen 12.
1 Sid. 73. 338.
4 Inst. 314.

Ant. 119, 185.

THE Plaintiff brought an Action of False Imprisonment against the Mayor of London and the Recorder, and the whole Court at the Old-Bailly, and the Sheriffs and Gaoler, for committing him to Prison at a Sessions there held. The Case was thus: Some Quakers were indicted for a Riot, and the Court directed the Jury, if they believed the Evidence, to find the Prisoners Guilty; for that the Fact sworn against them was in Law a Riot: which because they refused to do, and gave their Verdict against the direction of the Court in matter of Law, they committed them. They were afterwards discharged upon a Habeas Corpus. And one of them brings this Action for the wrongful Commitment. Serjeant Maynard moved for the Defendants, that they might have longer time to plead: for a Rule had been made that the Defendants should plead the first day of this Term. The Court declared their Opinions against the Action, viz. That no Action will lie against a Judge for a wrongful Commitment, any more than for an erroneous Judgment. Munday the Secondary told the Court, that giving the Defendants time to plead countenanced the Action, but granting imparlances did not. So they had a special Imparlance till Michaelmas-Term next. Atkyns. It was never imagined, that Justices of Oyer and Terminer and Gaol-delivery would be questioned in private Actions, for what they should do in execution of their Office; if the Law had been taken so, the Statute of 7 Jac. cap. 5. for pleading the general Issue, would have included them as well as inferior Officers.

Birch

Berch & Lake.

A Prohibition was granted to the Spiritual Court upon this suggestion, that Sir Edward Lake Alcar-general, ^(16.) Prohibition had cited the Plaintiff ex officio to appear and answer to divers Articles. The Court said, that the citation ex officio was in use, when the Oath ex officio was on foot: but that is ousted by the 17 Car. I. Cap. 11. §. 4. N. 2. If Citations ex officio were allowed, they might cite whole Counties without Presentment; which would become a trick to get money. And the party grieved can have no Action against the Alcar general, being a Judge, and having Jurisdiction of the cause, though he mistake his power. Per quod, &c. ^{Ante 119, 184.}

Anonymus.

Baron & Feme Administrators in the right of the Feme, ^(17.) Admini-
 bring an Action of Debt against Baron & Feme, Admini-
 strators likewise in the right of the Feme, de bonis non, &c. of
 J. S. The Action is for Rent incurred in the Defendants own
 time, and is brought in the debet & detinet. The Defendants
 plead, fully administred: to which the Plaintiffs demurred.
 Serj. Harges for the Plaintiff said, the Action was well brought
 in the debet & detinet for that nothing is Assets but the pro-
 fits over and above the value of the Rent; he cited Hargrave's
 case, 5 Rep. 31. 1 Rolls 603. 2 Cro. 238. Rich & Frank. ibid.
 411. ibid. 549. 2 Brook 202. 1 Bulstr. 22 Moor. 566. Poph.
 120. though if an Executor be Plaintiff in an Action for Rent
 incurred after the Testator's death, he must sue in the detinet
 only, because whatever he recovers is Assets: but though an
 Executor be Plaintiff, yet, if the Lease were made by himself, ^{2 Jones 169.}
 he must sue in the debet & detinet. Then, the plea of fully ^{1 Cr. 225.}
 administred, is not a good plea: for he is charged for his own
 occupation. If this plea were admitted, he might give in
 evidence payment of Debts, &c. for as much as the term is
 worth, and take the profits to his own use, and the Lessor be
 stripped of his Rent: in Sryles Reports, 49. in one Josselyn's case,
 this plea was ruled to be ill. And of that Opinion the Court
 was

2 Cr. 549.

was : and said, that Executors could not waive a Term (though if they could, they ought to plead it specially) for it is naturally in them, and prima facie is intended to be of more value than the Rent : if it should fall out to be otherwise, the Executors shall not be liable de bonis propriis, but must aid themselves by special pleading. For the plea, they said there was nothing in it : and gave Judgment for the Plaintiff.

Buckly & Howard.

(18.)
Statute
Merchant.

DEbt upon two Bonds, the one of 20 l. the other of 40 l. against an Administrator : the Defendant pleaded, that the Intestate was indebted to the Plaintiff in 250 l. upon a Statute Merchant, which Statute is yet in force, not cancel'd nor annul'd ; and that he has not above 40 shillings in Assets, besides what will satisfy this Statute. The Plaintiff replies, that the Statute is burnt with fire. The Defendant demurs, And by the Opinions of Wyndham, Atkyns & Ellis, Justices the Plaintiff had Judgment. For the Defendant by his demurrer has confessed the burning of the Statute : which being admitted and agreed upon, it is certain that it can never rise up against the Defendant : for the Stat. of the 23 Hen. 8. cap. 6. concerning Recognisances in the nature of a Statute-Staple, refers to the Statute-Staple, viz. that like Execution shall be had and made, and under such manner and form as is therein provided : the Statute-Staple refers to the Statute-Merchant ; and that to the Statute of Acton Burnel, 13 Ed. 1. which provides, that if it be found by the Roll, and by the Bill, that the Debt was acknowledged, and that the day of payment is expired, that then, &c. but if the Statute be burnt, it cannot appear that the day of payment is expired ; and consequently there can be no Execution. If the Recognisee will take his Action upon it, he must say, hic in Cur' prolat. 15 H. 7. 16. Vaughan differ'd in Opinion : he said, 1. That it is a rule in Law, that matter of Record shall not be avoided by matter in pais ; which rule is manifestly thwarted by this resolution. He said, it was a matter of Record to both parties ; and the Plaintiff could not avoid it by such a plea, any more than the Defendant could avoid it by any other matter of fact. He cited

a case, where the Obligee voluntarily gave up his Bond to the Obligor, and took it from him again by force, and put it in suit: the Defendant pleaded this special matter, and the Court would not allow it, but said, he might bring his Action of Trespass. 2. Suppose the Defendant had taken issue upon the Statutes being burnt, and it had been found to have been burnt; and yet had been found afterwards, the Defendant could not have any benefit of this Verdict. He said it was a proper case for Equity.

Co. Lit. 226. a.
Post. 266.

Slater & Carew.

DEbt upon a Bond. The Condition was, that if the Obligor, his heirs, Executors, &c. do yearly and every year, pay or cause to be paid to Tho. and Dor. his wife during their two lives, that then, &c. the Husband dies, and the question was, whether or no the payment should continue to the Wife? Serjeant Baldwin argued, that the money is payable during their lives and the longer liver of them: he cited Brudnel's case 5 Rep. and 1 Inst. 219. b. that whenever an Interest is secured for lives; it is for the lives of them and the longer liver of them: and Hill's case adjudged Pasch. 4 Jac. Rot. 112. in Warburton's Reports. Seyse contra. The interest of this Bond is in the Obligee; the Husband and Wife are strangers, and therefore the payment ceaseth upon the death of either of them: and of that Opinion was the whole Court; and grounded themselves upon that distinction in Brudnel's case, betwixt where the Cestuy que vies have an interest, and the cases of collateral limitations. They said also, that in some cases an interest would not survive, as if an Office were granted to two, and one of them dyed, unless there were words of Survivorship in the Grant. So the Plaintiff was barred. (19.)

Term. Mich. 26 Car. II. in Communi Banco.

Farrer & Brooks *Administrat. of Jo. Brooks.*

(20.)
Execution.
29 Car. 2. c. 3.
§. 16. N. 1.

The Plaintiff had Judgment in Debt against John Brooks the intestate : and took out a Fieri facias, bearing teste the last day of Trin. Term. de bonis & catallis of John Brooks : before the Execution of which Writ John Brooks dies, and Eliz. Brooks administers : the Sheriff's Bailiff executes the Writ upon the Intestate's Goods in her hands. Upon this Serjeant Baldwin moved the Court for Restitution, for that a Fieri facias is a Commission, and must be strictly pursued. Now the words of the Writ are de bonis of John Brooks : and by his death they cease to be his Goods. The Plaintiff will be at no prejudice ; the Goods will still remain lyable to the Judgment ; only let the Execution be renewed by Scire facias, to which the Administratress may plead somewhat. Wyndham. The property of the Goods is so bound by the Teste of the Writ, as that a Sale made of them bona fide shall be avoided : which is a stronger case. And since the Intestate himself could not have any plea, why should we take care that the Administrator should have time to plead ? And of that Opinion was all the Court, after they had advised with the Judges of the King's Bench : who informed them that their practice was accordingly. But Vaughan said, that in his Opinion it was clearly against the rules of Law. But they said there were cases to this purpose in Cr. Car. Rolls, Moor, &c.

Liefe & Saltingstone's Case.

Eject' firmæ. The case upon a special Verdict was thus, viz. Sir Ric. Saltingstone being seized in Fee of Rees-Farm, on 17th day of Febr', in the 19th year of the King, made his Will in writing, in which were these words, viz. for Rees-Farm in such a place, I will and bequeath it to my Wife during her natural life : and by her to be disposed of to such of my Children as she shall think fit : Sir Richard dyed : his Wife entred and sealed such a Writing as this, viz. Omnibus Christi fidelibus, &c. Noveritis, that whereas my Husband Sir Richard Saltingstone, &c. reciting that clause in the Will : I do dispose, the same in manner following ; that is to say, I dispose it, after my decease, to my Son Philip and his heirs for ever. The Wife died, and Philip entred and dyed, and left the Lessor of the Plaintiff his Son and heir. The question was, what Estate Philip took ? or what Estate the Testator intended should pass out of him ? This case was argued in Easter-Term last past, by Serjeant Scroggs for the Plaintiff ; and by Serjeant Waller for the Defendant : and in Trinity-Term by Serjeant Baldwin for the Plaintiff, and Serjeant Newdigate for the Defendant. They for the Plaintiff insisted upon the word dispose ; that when a man deviseth his Land to be disposed by a stranger, it has been always held to be a bequeathing of a Fee-simple, or at least a power to dispose of the Fee-simple, 19 H. 8. 10. Moor 5 Eliz. 57. per Dyer, Weston & Wellshe : but they chiefly relied on Daniel & Uply's case in Latch.

The Defendant's Counsel urged, that the heir at Law ought not to be disinherited without very express words. That if the Devisor himself had said in his Will, I dispose Rees-Farm to Philip ; that Philip would have had no more than an Estate for life : and what reason is there, that the disposal being limited to another, should carry a larger Interest, than if it had been executed by the Testator himself ? This Term it was argued at the Bench, and by the Judgments of Ellis, Wyndham & Atkyns Justices, the Plaintiff had Judgment. They agreed that the Wife took by the Will an Estate for her own life, with a power to dispose of the Fee. She cannot take a larger Estate to her self by implication, than an Estate for life ; because an Estate for life is given to her by express limitation

(21.)
Demise.3 Cr. 16, 160.
3 Leon. 71.

mitation : 1 Bullst. 219, 220. Whiting & Wilkin's case. For cases resembling the case in question were cited, 7 Ed. 6. Brook, tit. Devise 39. 1 Leon. 159. & Daniel & Uply's case : & Clayton's case in Latch. It is objected that in Daniel & Uply's case, there are these words, at her will and pleasure : to which they answered, that if she have a power to dispose according to her discretion, and as she her self pleaseeth ; and then expressio eorum quæ tacite insunt, nihil operatur. If I devise that J. S. shall sell my Land, he shall sell the Inheritance : Kelloway 43, 44. 19 H. 8. fol. 9. Where the Devisor gives to another a power to dispose, he gives to that person the same power that himself had. Vaughan Chief Justice differed in Opinion ; he said, it is plain that the word dispose does not signifie to give, for if so, then it is evident that the Lessor of the Plaintiff cannot have any title : for if the Wife were to give, then were the Estate to pass out of her, which could not be by such an appointment as she makes here, but must be by a legal Conveyance. Besides, she cannot give what she has not, and she has but an Estate for life. If then it does not signifie to give, what does it signifie ? let us a little turn the words, and a plain certain signification will appear ? I will and bequeath Rees-Farm to such of my Children as my Wife shall think fit, at her disposal ? at this rate the Wife does but nominate what person shall take by the Will. This is a plain case, and free from uncertainty and ambiguity, which else the word dispose will be liable to. But Judgment was given, ut supra.

3 Leon. 71.

Howell *versus* King.

(22.)
Way.

TRESPASS, for driving Cattel over the Plaintiffs ground. The case was ; A. has a way over B's ground to Black-acre, and drives his Beasts over B's ground to Black-acre, and then to another place lying beyond Black-acre. And whether this was lawful or no, was the question upon a demurrer. It was urged, that when his Beasts were at Black-acre, he might drive them whither he would : Rolls 391. nu. 40. 11 H. 4. 82. Brook, tit. chimin. On the other side it was said, that by this means the Defendant might purchase a hundred

or a thousand Acres adjoyning to Black-acre, to which he prescribes to have a way : by which means the Plaintiff would lose the benefit of his Land : and that a Prescription presupposed a grant, and ought to be continued according to the intent of its original Creation. The whole Court agreed to this. And Judgment was given for the Plaintiff.

1 Rol. 397.
Pl. 3.

Warren, *qui tam*, &c. *versus* Sayre

The Court agreed in this case, that an Information for (23.)
not coming to Church, may be brought upon the Stat. Informa-
of 23 Eliz. only, reciting the clause in it that has reference to tion.
Stat. 1. of the Queen : and that this is the best and surest way
of declaring.

Term. Hill. 26 & 27 Car. II. in Com. Banco.

Williamson & Hancock

Hill. 24 & 25 Car. 2. Rot. 679.

(24).
7 Feb. 408.
27 H. 8. c. 10.

Co. Lit. 215. b.

3 Co. 62. b.

Tenant for life, the Remainder in Tail. Tenant for life levies a Fine to J. S. and his heirs, to the use of himself for years, and after to the use of Hannah and Susan Prinne and their heirs, if such a sum of money were unpaid by the Conusor, and if the money were paid, then to the use of the Conusor, and his heirs. And this Fine was with general warranty. The Tenant for life died, the money unpaid, and the warranty descended upon the Remainder-man in Tail. And the question was, whether the Remainder-man were bound by this warranty or not? Serjeant Maynard argued, that because the Estate of the Land is transferred in the Post, before the warranty attaches in the Remainder-man, that therefore it should be no Bar. He agreed, that a man that comes in by the limitation of an use shall be an Assignee within the Statute of 32 H. 8. cap. 34. by an equitable construction of the Statute, because he comes in by the limitation of the party, and not purely by Act in Law: but this case of ours is upon a collateral garranty, which is a positive Law, and a thing so remote from solid reason and equity, that it is not to be stretch'd beyond the maxime. That the Cestuy que use in this case shall not vouch, is confessed on all hands: and there is the same reason why he should not rebutt. He said the resolution mentioned in Lincoln Colledge case, was not in the case, nor could be: the warranty there was a particular warranty, contra tunc Abbatem Westmonasteriensem & successores suos; which Abby was dissolved long before that case came in question. He said, Justice Jones upon the arguing of Spirt & Bence's case, reported in Cro. Car. said, that he had been present at the Judgment in Lincoln Colledge case

case and that there was no such resolution as is there reported. Serjeant Baldwin argued on the other side: that at the Common Law many persons might rebutt, that could not take advantage of a warranty by way of Voucher: as the Lord by Escheat, the Lord of a Villain, a Stranger, Tenant in possession: 35 Ass. plaito 9. 11 Ass. plaito 3. 45 Ed. 3. 18. plaito 11. 42 Ed. 3. 19. b. a fortiori, he said, he that is in by the limitation of an use, being in by the act of the party (though the Law cooperate with it, to perfect the assurance) shall rebutt. ^{3 Co. 61, 63.}

The Court was of Opinion that the Cestuy que use might rebutt; that though Voucher lies in privacy, an abater of intruder might rebutt. F. N. B. 135. 1 Inst. 385. As to Serjeant Maynards' Objection, that he is in the Poss; they said they had adjudged lately in Fowle & Doble's case, that a Cestuy que use might rebutt. So it was held in Spirt & Bence's case, Cro. Car. and in Jones 199. Kendal & Fox's case. That Report in Lincoln Colledge case, whether there were any resolution in the case or no, is founded upon so good reason, that Conveyances since have gone according to it. Arkyns said, there was a difficult clause in the Statute of Uses, viz. That all and singular person and persons, &c. which at any time on this side the first day of May, &c. 1536. &c. shall have, &c. By this clause they that came in by the limitation of an use before that day, were to have the like advantages by Voucher or Rebutter, as if they had been within the degrees. If the Parliament thought it reasonable, why was it limited to that time? Certainly the makers of that Law intended to destroy Uses utterly, and that there should not be for the future any Conveyances to Uses. But they supposed that it would be some small time before all people would take notice of the Statute, and make their Conveyances accordingly; and that might be the reason of this clause. But since, contrary to their expectations, Uses are continued, he could easily be satisfied, he said, that Cestuy que use should rebutt. Wyndham was of Opinion, that Cestuy que use might vouch: he said there was no Authority against it, but only Opinions obiter. They all agreed for the Defendant, and Judgment was given accordingly. ^{Antea 181.}

Moor 859.

Hob. 27.

1 Cro. 370, 371

Rogers *versus* Davenant Parson of
White-Chappel.

(25.)
Taxes.
Post 136.
Infra 236.pl.2.
Supra 79.pl.41
1 Vent. 367.
5 Co. 63. a.

NOrth Chief Justice : The Spiritual Court may compell Parishioners to repair their Parish Church, if it be out of Repair, and may Excommunicate every one of them, till it be repaired : and those that are willing to contribute must be absolved, till the greater part of them agree to assess a Tax ; but the Court cannot assess them towards it ; It is like to a Bridge or a High-way ; a Distringas shall issue against the Inhabitants, to make them Repair it : but neither the King's Court, nor the Justices of Peace can impose a Tax for it. Wyndham, Atkyns & Ellis accorded ; The Church-wardens cannot ; none but a Parliament can impose a Tax : but the greater part of the Parish can make a By-Law ; and to this purpose they are a Corporation. But if a Tax be illegally imposed, as by a Commission from the Bishop to the Parson, and some of the Parishioners, to assess a Tax ; yet if it be assented to, and confirmed by the major part of the Parishioners, they in the Spiritual Court may proceed to Excommunicate those that refuse to pay it.

Compton & Ux. *versus* Ireland.

Mich. 26 Car. 2. Rot. 691.

(26.)
Escape.

1 Rol. 902.
pl. 8.
1 Cro. 328.
Pract. Reg. 158

Scirefacias be the Plaintiffs as Executors, to have Execution of a Judgment obtained by their Testator, unde Executio adhuc restat faciend. The Defendant confesseth the Judgment, but says that a Cap. ad satisf. issued against him, upon which he was taken, and was in the custody of the Warden of the Fleet ; and that he paid the sum mentioned in the condemnation, to the Warden of the Fleet, who suffered him to go at large. The Plaintiff demurred. This the Court held to be no plea ; but that it was a voluntary escape in the Warden, and Judgment was given for the Plaintiff.

Haley's

Haley's Case.

PEr Cur'. If a Habeas Corpus, be directed to an inferiour Court, returnable two days after the end of the Term (27.) yet the inferiour Court cannot proceed contrary to the Writ of Habeas Corpus. North cited the case of Staples, Steward of Windsor; who hardly escaped a Commitment, because he had proceeded after a Habeas Corpus delivered to him (though the value were under five pounds) and would not make a Re- Ante 28. turn of it.

The King against Sir Francis Clerke.

Ent. Hill. 24 & 25 Car. 2. Rot. 594.

The case upon a special Verdict was thus, viz. The King (28.) being seized in fee of the Mannor of Leyborn in Kent, Patents. to which the Abbowlson of the Church of Leyborn is appen. 3 Keb. 412. dant (which Mannor came to him by the dissolution of Monasteries, having been part of the possessions of the Abbot of Gray-Church) granted the Mannor to the Archbishop of Canterbury and his Successors, saving the Abbowlson; Afterward the King presents to the Church, being void J. S. The Archbishop of Canterbury grants the Mannor, and the Abbowlson, to the King, his Heirs and Successors; which grant is confirmed by the Dean and Chapter: the King grants the Mannor with the appurtenances, and this Abbowlson (naming it in particular) which lately did belong to the Archbishop of Canterbury, and to the Abbot of Gray-Church; together with all privileges, profits, commodities, &c. in as ample manner, as they came to the King's hand by the grant of the Archbishop, or by colour or pretence of any grant from the Archbishop, or confirmation of the Dean and Chapter, or by surrender of the late Abbot of Gray-Church, or as amply as they are now, or at any time were in our hands, to Sir Edw. North and his heirs, &c. The question was, whether or no by this

grant the Abbotsdon passed. Serjeant Newdigate. The King is not apprised of his title, and therefore the grant void: 1 Rep. 52. a. for he thought this Abbotsdon came to him by grant from the Archbishop. He cited Moor 318, Inglefield's case. If the King be deceived in Deed or in Law, his grant is void: Brook, Patents 104. 1 Rep. 51, 52. 1 Rep. 46, 49. 10 Rep. Arthur Legat's case. Hob. 228, 229, 230, &c. ibid. 223, 243. Dyer 124. 1 Rep. 50. Hob. 170. Moor 888. 1 Rep. 49. 2 Rep. 33. 11 Rep. 90. 9 H. 6. 28. b. 2 Rolls 186. Hob. 323. Coke's Entries 384. Serjeant Hardes contra. He laid down four grounds or rules whereby to construe the King's Letters Patents: 1. Where a particular certainty precedes, it shall not be destroyed by an uncertainty, or a mistake coming after; 1 Cro. 34. & Yel. 42. 2 Cro. 48. 3 Leon. 162. 1 And. 148. 19 Ed. 3. 71. b. 10 H. 4. 2. Godb. 423. Markham's case cited in Arthur Legate's case, 10 Rep. 2. There is a difference when the King mistakes his title to the prejudice of his tenure or profit, and when he is mistaken only in some description of his grant, which is but supplemental, and not material to the issue: 21 Ed. 4. 49. 33 H. 7. 6. 36 H. 8. 1. & 38 H. 6. 37. 9 Ed. 4. 11, 12 Lane's Report 111. 2 Co. 54. 1 Bulstr. 4. 3. Distinct words of relation in the King's grant, are good to pass away any thing: Dyer 350, 351. 9 Rep. 24. &c. Whistler's case, 10 Co. 4. When the King's grants are upon a valuable consideration, they shall be construed favourably for the Patentee, for the honour of the King: 18 Ed. 1. de Quo Warranto. 2 Inst. 446, 447. 6 Rep. Sir John Molyn's case, 10 Co. 65. a. Then he applied all these rules to the case in question, and prayed Judgment. Afterward Serjeant Maynard argued against the passing of the Abbotsdon. He said those two descriptions of the Abbotsdon, viz. belonging lately to the Archbishop of Canterbury, and formerly to the Abby of Gray-Church, are coupled together with a Conjunctive (et) so that both must be true. So here is a falsity in the first and material part of the grant, viz. the description of the thing granted: though the Abbotsdon of Leyborn be named, yet it is so named, as to be capable of a generality: for there may be more Abbotsdons than one belonging to that Manor. This falsity goes to the title of the Church. No subsequent words will aid this misrecital; for the description of the thing granted ends there. The following words, viz. adeo plene, &c. and whatever comes after, do but set out how fully and amply he should enjoy

enjoy the thing granted : and being no part of its description, cannot enlarge it or make it more certain : 8 H. 4. 2. Serj. Turner contra, cited these books, viz. Bacon's Elements 96. 1 Leon. 120. Veritas nominis tollit errorem demonstrationis. 29 Ed. 3. 7, 8. 1 And. 148. Plowd. Com. 192. 2 Co. Doddington's case. 10 Co. 113. 19 Ed. 3. Fitzherb. grants. 58. 10 H. 4. 2. Sir John L'Estranges case. Markham's case 10 Co. in Arthur Legare's case. Cro. Car. 548. Ann Needler's case, in Hob. 9 H. 6. 12. Brook Annuity 3. Baker & Bacon's case Cro. Jac. 48. & Bozoun's case, 4 Rep. 6 Co. 7. Cro. Jac. 34. 1 Leon. 119, 120. 2 Rolls, Prerog. le Roy 200. 8 Co. 167. 21 Ed. 4. 46. 8 Co. 56. Rolls, tit. Prerog. 201. 10 Co. 64. 9 Co. the Earl of Salop's case. 1 Inst. 121. b. Moor 421. 2 Rolls 125. **This Term the Court gave their Judgment, that the Adowson did well pass. In this grant there are as large words, and the same words that are in Whistler's case 10 Rep. and the King is not here deceived, neither in the value, nor in his title. And Judgment was given accordingly.**

Furnis & Waterhouse.

It was moved for a Superedeas to stay proceedings upon a Grand Cape in Dower, quia erronee emanavit : because (29.)
the return of the Summons was not according to the Stat. of Dower.
31 Eliz. cap. 3. the Stat. is, after Summons. 2. The Land lieth in a Till called Heriock : and the Return is of a Proclamation of Summons at the Parish Church of Halyfax : and it does not appear that the Land lies within that Parish. 3. The Return is proclamari feci secundum formam Statuti : and it is not returned to have been made upon the Land : Hob. 33. Allen & Walter. These were all held erroneous ; and the Grand Cape was superseded.

Term. Pasch. 26 Car. II. in Communi Banco.

*Naylor against Sharply and others Coroners
of the County Palatine of Lancaster.*

(30.)
Arrest.

Hob. 209.
3 Cro. 533.

A Man brings an Action of Debt against B. Sheriff of the County Palatine of Lancaster, and sues him to an Outlawry upon mean Process, and has a Capias directed to the Chancery of the County Palatine, who makes a Precept to the Coroners of the County, being six in all, to take his body, and have him before the King's Justices of the Court of Common-Pleas at Westminster such a day. One of the Coroners being in sight of the Defendant, and having a fair opportunity to Arrest him, doth it not: but they all return non est inventus: though he were easie to be found, and might have been taken every day. Whereupon the Plaintiff brings an Action against the Coroners, and lays his Action in Middlesex and has a Verdict for 100 l. Serj. Baldwin moved in Arrest of Judgment: that the Action ought to have been brought in Lancaster: He agreed to the cases put in Bulwer's case 7 Rep. where the cause of Action arises equally in two Counties; but here all that the Coroners do, subists and determines in the County Palatine of Lancaster; for they make a Return to the Chancery of the County Palatine only, and it is he that makes the Return to the Court: He insisted upon Dyer 38, 39, 40. Hulse & Gibbs. 2. He said this Action is grounded upon two wrongs, one the not arresting him when he was in sight; the other for returning non est inventus, when he might easily have been taken: now for the wrong of one, all are charged, and entire damages given. He said two Sheriffs make but one Officer, but the case of Coroners is different: each of them is responsible for himself only, and not for his Companion. Serjeant Turner & Pemberton contra.

tra. They said the Action was well brought in Middelfex, because the Plaintiffs damage arose here, viz. by not having the body here at the day. They cited Bulwer's case, & Dyer 159. b. the Chancery returns to the Court the same answer that the Coroners return to him, so that their false Return is the cause of prejudice that accrues to the Plaintiff here. The ground of this Action is the return of non est inventus, which is the act of them all: that one of them saw him, and might have arrested him, and that the Defendant was daily to be found, &c. are but mentioned as arguments to prove the false Return. And they conceived an Action would not lie against one Coroner, no more than against one Sheriff in London, York, Norwich, &c. But to the first exception taken by Baldwin, they said, admitting the Action laid in another County than where it ought, yet after Verdict it is aided by the Statute of 16 & 17 Car. 2. If the Ven. Cap. 8. § 1.
N. 11.
Ante 37. come from any place of the County where the Action is laid: It is not said, in any place of the County where the cause of Action ariseth: now this Action is laid in Middlefex, and so the Trial by a Middlefex Jury good, let the cause of Action arise where it will. Cur. That Statute doth not help your case; for it is to be intended when the Action is laid in the proper County, where it ought to be laid, which the word proper County implies. But they inclined to give Judgment for the Plaintiff upon the reasons given by Turner & Pemberton. Adjournatur.

Bird & Kirk.

It was resolved in this case by the whole Court; 1. That (31.)
Copyhold. if there be Tenant for life, the Remainder for life of a Copyhold, and the Remainder-man for life enter upon the Tenant for life in possession, and make a surrender, that nothing at all passeth hereby; for by his entry he is a Disseisor; and has no customary Estate in him, whereof to make a surrender. 2. That when Tenant for life of a Copyhold suffers a Recovery as Tenant in Fee, that this is

4 Co. 32.

9 Co. 107.

Cro. Car. 205.

is no forfeiture of his Estate; for the Free-hold not being concern'd, and it being in a Court-Baron, where there is no Estoppel, and the Lord that is to take advantage of it, if it be a forfeiture, being party to it, it is not to be resembled to the forfeiture of a Free-Tenant: that Customary Estates have not such accidental qualities as Estates at Common Law have, unless by special Custom. 3. That if it were a forfeiture of this and all other forfeitures committed by Copy-holders, the Lord only, and not any of those in Remainder ought to take advantage. And they gave Judgment accordingly. North Chief Justice said, that where it is said in King & Lord's case in Cro. Car. that when Tenant for life of a Copy-hold surrenders, &c. that no use is left in him, but whosoever is afterward admitted, comes in under the Lord; that it is to be understood of Copy-holds in such Mannors where the Custom warrants only Customary Estates for life; and is not applicable to Copy-holds granted for life, with a Remainder in Fee.

Anonymus.

(32.)
Encumbent

A Writ of Annuity was brought upon a Prescription against the Rector of the Parish Church of St Peter, in, &c. the Defendant pleads, that the Church is overflown with the Sea, &c. the Plaintiff demurs. Serjeant Nudigate pro Querente: The Declaration is good, for a Writ of Annuity lies upon a prescription against a Parson, but not against an heir: F. N. B. 152. Rastall 32. the plea of the Church being drowned is not good: at best it is no more than if he had said that part of the Glebe was drowned: it is not the building of the Church, nor the consecrated ground, in respect whereof the Parson is charged; but the profits of the Tythes and the Glebe. Though the Church be down one may be presented to the Rectory: 21 H. 7. 1. 10 H. 7. 13. 16 H. 7. 9. & Luttrell's case, 4 Rep. Wilmore contra. The Parson is charged as Parson of the Church of St. Peter; we plead in effect that there is no such Church, and

and he confesseth it. 21 Ed. 4. 83. Br. Annuity 39. 21 Ed. 4. 20. 11 H. 4. 49. we plead that the Church is submersa, obruta, &c. which is as much a dissolution of the Rectory as the death of all the Monks is a dissolution of an Abbathie. It may be objected that the Defendant has admitted himself Rector by pleading to it: but I answer, 1. An Estoppel is not taken notice of, unless relied on in pleading. 2. The Plaintiff by his demurrer has confessed the Fact of our Plea, by which mean the matter is set at large, though we were estopped. The Court was clearly of Opinion for the Plaintiff. The Church is the Cure of Souls, and the right of Tythes. If the material Fabrick of the Parish Church be down, another may be built, and ought to be. *Judicium pro Quer', nisi, &c.* Church.

Term. Trin. 27 *Car. II.* in Communi Banco.

Vaughan versus Atwood & alios.

(33.)
Victuals.

TRESPASS for taking away some flesh-meat from the Plaintiff; being a Butcher. The Defendant justifies by virtue of a Custom of the Manor of, &c. that the Pomage used to chuse every year two Surbeyors to take care that no unwholesome Victuals were sold within the Precinct of that Manor; and that they were sworn to execute their Office truly for the space of a year: and that they had power to destroy whatever corrupt Victuals they found exposed to sale; and that the Defendants being chosen Surbeyors, and sworn to execute the Office truly, examining the Plaintiffs Meat (who was also a Butcher) found a side of Beef corrupt and unwholesome, and that therefore they took it away and burnt it, prout ei bene licuit, &c. The Plaintiff demurs.

North. This is a Case of great consequence, and seems doubtful. It was hard to disallow the Custom, because the design of it seems to be for the preservation of Men's health, and to allow it were to give Men too great a power of seizing and destroying other Mens Goods. There is an Aleaster appointed at Leets, but all his Office is to make Presentment at the Leet, if he finds it not according to the Assize. Wyndham, Atkins & Ellis: It is a good reasonable Custom. It is to prevent evil, and Laws for prevention are better than Laws for punishment. As for the great power that it seems to allow to these Surbeyors, it is at their own peril if they destroy any Victuals that are not really corrupt; for in an Action, if they justify by virtue of the Custom, the Plaintiff may take issue, that the Victuals were not corrupt. But here the Plaintiff has confessed it by the demurrer. Atkyns said, if the Surbeyors were not responsible, the Pomage that put them in must answer for them, according to the Rule of respondeat superior. Judgment was given for the Defendant, unless, &c.

Thred-

Threadneedle & Lynham's Case.

1 L. Rep. 176 1. Freeman 42. 3. Rob. 192. 2. Mod. 57.

UPON a special Verdict, the Case was thus. The Jury (34.) found that the Lands in the Declaration are, and time In 1 Eliz. 19. out of mind had been parcel of the Demesns of the Manor of Exp. 26. N. 1. Burniel in the County of Cornwall; which Manor consists of Demesns, viz. Copp-hold Tenements demissable for one, two, or three Lives, and services of divers free-hold Tenants: that within the Manor of Burniel, there is another Manor called Trecaer, consisting likewise of Copp-holds and free holds: and that the Bishop of Exeter held both these Manors in the right of his Bishoprick. Then they find the Statute of 1 Eliz. in hæc verba. They find that the old accustomed yearly Rent, which used to be reserved upon a demise of these two Manors was 67 l. 1 s. 5 d. then they find that Joseph Hall Bishop of Exeter, demised these two Manors to one Prowse for 99 years, determinable upon three Lives, reserving the old and accustomed Rent of 67 l. 1 s. and 6 s. That Prowse, living the Cestuy que vies, assigned over to James Prowse the demesns of the Manor of Trecaer, for that afterwards he assigned over all his Interest in both Manors to Mr. Nosworthy, excepting the demesns of Trecaer, then in the possession of James Prowse: That Mr. Nosworthy, when two of the Lives were expired, for a sum of Money by him paid to the Bishop of Exeter, surrendered into his hands both the said Manors, excepting what was in the possession of James Prowse; and that the Bishop (Joseph Hall's Successor) redemised unto him the said Manors, excepting the demesns of Trecaer, and excepting one Messuage in the Occupation of Robert , and excepting one Farm, parcel of the Manor of Burniel, for three Lives, reserving 67 l. 1 s. 5 d. with a nomine pœnz: and whether this second Lease was a good Lease, and the 67 l. 1 s. 5 d. the old and accustomed Rent, within the intention of the Statute of 1 Eliz. was the question. After several Arguments at the Bar, it was argued at the Bench in Michaelmas-Term, Anno 26 Car. 2. And the Court was divided, viz. Vaughan & Ellis against the Lease; Atkyns & Wyndham for it. This Term North Chief Justice delivered his Opinion in which he agreed with Atkyns & Windham; so that

D D 2

Judg.

Co. L. 44.
5 Co. 5.
1 Cro. 95.

Judgment was given in maintainance of the Lease; and the Judgment was affirmed in the Kings-Bench, upon a Writ of Error.

The Chapter of the Collegiate Church of Southwell versus the Bishop of Lincoln, and J. S. Incumbent, &c.

(35.)
Dean.

In a Qua. Imp. the Incumbent's Title was under a Grant made by the Plaintiffs, who were seized of the Advowson, ut de uno grosso, in the right of their Church, of the next avoidance, one Esco being then Incumbent of their Presentation, to Edward King, from whom by mean assignments it came to Elizabeth Bley, who after the death of Esco presented the Defendant.

Upon a demurret these Points came in Question, 1. Whether the Grants were within the Statute of the 13th Eliz. or not? 2. Whether a Grant of the next avoidance be restrained by the Statute? 3. If the Grant be void, whether it be void ab initio, or when it becomes so? And 4. Whether the Statute of 13 Eliz. shall be taken to be a general Law? for it is not pleaded. Serjeant Jones. 1. For the first point argued, that the Grants are within the Statute; the words are Deans and Chapters, which he said might well be taken severally, for of this Chapter there is no Dean. If they were to be taken jointly then a Dean were not within this Law, in respect of those Possessions, which he holds in the right of his Deanery; but the subsequent general words do certainly include them; and would extend even to Bishops, but that they are superior to all that are expressed by Name. 2. For the second, he said the Statute restrains all gifts, grants, &c. other than such, upon which the old Rent, &c. He cited Cro. Eliz. 440. 5. Co. the Case of Ecclesiastical persons, 10 Co. the Earl of Salisbury's Case. 3. For the third Point, he held it void ab initio: it must be so, or good for ever: For here is no Dean, after whose death it may become void; as in

3 Co. 59. 5 Co.
15. 10 Co. 60.

Hunt

Hunt and Singleton's Case: the Chapter in our Case never dies. 4. For the fourth Point he argued that it is a general Law, because it concerns all the Clergy: Holland's Case, 4 Co. & Dumpsor's Case *ibid.* 210.b. Willmote contra. North Chief Justice, Atkins, Wyndham & Ellis Justices, all agreed upon the three first Points, as Sergeant Jones had argued. Atkins doubted whether the 13 of Eliz. were a general Law or not: but was over-ruled. They all agreed, that the Action should have been brought against the Patron, as well as against the Ordinary and the Incumbent; but that being only a Plea in abatement, that the Defendant has waived the benefit thereof, by pleading in Bar. And Judgment was given for the Plaintiff, *Nisi causa*, &c. Hunt and Singleton's Case being mentioned, Atkins said: he thought it a hard case considering that the Dean and the Chapter were all persons capable, that a Grant should hold in force as long as the Dean lived, and determine then. He thought they being a Corporation aggregate of persons, who were all capable, that there was no difference betwixt that case and this. Ellis said, that in Floyd and Gregory's Case, reported in Jones, it was made a point: and that Jones in his argument denied the Case of Hunt & Singleton: he said that himself and Sir Rowland Wainscott Reported it, and that nothing was said of that point: but that my Lord Coke followed the Report of Serjeant Bridgman, who was three or four years their poise, and that he mistook the Case.

Ant. 58.

6 Co. 25.

Milword & Ingram.

THE Plaintiff declares in an Action of the Case upon a quantum meruit for 40 shillings and upon an Indebitatus Assumpsit for 40 s. likewise. (36.) The Defendant acknowledged the Promises; but further says, that the Plaintiff and he accounted together for divers Sums of Money; and that upon the foot of the Account, the Defendant was found to be indebted to the Plaintiff in 3 shillings, and that the Plaintiff in consideration that the Defendant promised to pay him those 3 shillings, discharged him of all demands. The Plaintiff demurred. The Court gave Judgment against the

Assumpsit.

the demurrer : 1. They held that if two men, being mutually indebted to each other, do account together, and the one is found in arrear so much, and there be an express agreement to pay the Sum found to be in Arrear, and each to stand discharged of all other demands : that this is a good discharge in Law, and the Parties cannot resort to the original Contracts. But North Chief Justice said, if there were but one Debt betwixt them, entering into an account for that would not determine the Contract. 2. They held also, that any promise might well be discharged by Paroll, but not after it is broken, for then it is a Debt.

2 Rol. 408.
post. 262.
Infra 210. pl.
42.
Infra 261. pl.
14.

Jones & Wait.

(37.)
Infra 250. pl.

Shrewsbury & Cotton are Towns adjoining ; Sir Samuel Jones is Tenant in Tail of Lands in both Towns : Shrewsbury and Cotton are both within the Liberties of the Town of Shrewsbury. Sir Samuel Jones suffers a Common Recovery of all his Lands in both Villis, but the Præcipe was of two Messuages and Closes thereunto belonging (these were in Shrewsbury) and of, &c. (mentioning those in Cotton) lying and being in the Vill of Shrewsbury, and the Liberties thereof. And whether by this Recovery the Lands lying in Cotton, which is a distinct Vill of it self, not named in the Recovery, pass or not, was the Question. Serjeant Jones argued against the Recovery. He cited Cro. Jac. 575. in Monk and Butler's Case, and Cro. Car. 269, 270. & 276. he said the Writ of Covenant, upon which a Fine is levied, is a personal Action ; but a Common Recovery is a real Action, and the Land it self demanded in the Præcipe. There is no President, he said of such a Recovery. He cited a Case Hill. 22 & 23 Car. 2. Rot. 223. Huton 106. and March's Reports, one Johnson & Baker's Case, which he said was the Case in Point, and resolved for him. But the Court were all of Opinion that the Lands in Cotton passed. And gave Judgment accordingly. Ellis said, if the Recovery were erroneous, at least, they ought to allow of it, till it were reversed.

Post. 251.

Lepping

Lepping & Kedgewin.

AN Action in the nature of a Conspiracy was brought by the Plaintiff against the Defendant; in which the Declaration was insufficient. The Defendant pleaded an ill Plea: but Judgment was given against the Plaintiff, upon the insufficiency of the Declaration. Which ought to have been entred, *Quod Defendens eat inde sine die*: but by mistake or out of design, it was entred, *Quia placitum prædictum, in forma prædicta superius placitat materiaque in eodem contenta, bonum & sufficiens in lege existit, &c. Ideo consideratum est per Cur', quod Quer' nil capiat per billam.* The Plaintiff brings a new Action, and declares aright. The Defendant pleads the Judgment in the former Action, and recites the Record verbatim as it was. To which the Plaintiff demurred. And Judgment was given for the Plaintiff, nisi causa, &c. North Chief Justice: There is no Question but that if a Man mistakes his Declaration, and the Defendant demurs; the Plaintiff may set it right in a second Action. But here it is objected, that the Judgment is given upon the Defendant's Plea. Suppose a Declaration be faulty, and the Defendant take no advantage of it, but pleads a Plea in bar: and the Plaintiff takes issue, and the right of the matter is found for the Defendant; I hold that in this Case the Plaintiff shall never bring his Action about again: for he is estopped by the Verdict. Or suppose such a Plaintiff demur to the Plea in bar; there by his demurrer he confesseth the Fact, if well pleaded; and this estops him as much as a Verdict would. But if the Plea were not good, then there is no Estoppel. And we must take notice of the Defendant's Plea; for upon the matter as that falls out to be good, or otherwise, the second Action will be maintainable, or not. The other Judges agreed with him in omnibus.

(38.)

Estoppel.

8 Co. 62.

1 Cro. 545.

Atkinson & Rawson.

(39.)
Executor.5 Co. 30.
Yelv. 137.

THE Plaintiff declares against the Defendant as Executor. The Defendant pleads that the Testator made his Will, and that he the Defendant, suscepto super se onere Testamenti prædict. &c. did pay divers Sums of Money due upon Specialties, and that there was a Debt owing by the Testator to the Defendant's Wife; and that he retained so much of the Testator's Goods, as to satisfy that Debt, and that he had no other Assets: The Plaintiff demurr'd, because for ought appears the Defendant is an Executor de son tort: and then he cannot retain, for his own debt. The Plaintiffs naming him in his Declaration, Executor of the Testament of, &c. will not make for him; for that he does of necessity: he cannot declare against him any other way, and of that Opinion was all the Court, viz. that he ought to entitle himself to the Executorship, that it may appear to the Court, that he is such a person as may retain. And accordingly Judgment was given for the Plaintiff.

Term. Hill 27 & 28 Car. II. in Com. Banco.

Smith's Case.

A Man dies, leaving Issue by two several Venters, viz. by the first three Sons; and by the second two Daughters. One of the Sons dies intestate: the elder of the two surviving Brothers takes out Administration, and Sir Lionel Jenkins Judge of the Prerogative Court, would compell the Administrator to make distribution to the Sisters of the half-blood. He prayed a Prohibition, but it was denied upon advice by all the Judges: for that the Sisters of the half-blood, being a kin to the Intestate, and not in remotiori gradu than the Brother of the whole blood, must be accounted in equal degree.

(40.)
Cotnage.
3 Keb. 601.
21 H. 8. c. 5.
§. 3. N. 6.
2 Mod. 204.

Anonymus.

A Action was brought against four men, viz. two Attorneys and two Solicitors, for being Attornies and Solicitors in a cause against the Plaintiff in an inferiour Court, falso & malitiose, knowing that there was no cause of Action against him: and also for that they sued the Plaintiff in another Court, knowing that he was an Attorney of the Common-Pleas, and privileged there. Per tot' Cur', there is no cause of Action. For put the case as strong as you will: suppose a man be retained as an Attorney to sue for a debt, which he knows to be released, and that himself were a witness to the Release; yet the Court held that the Action would not lye; for that what he does, is only as Servant to another, and in the way of his Calling and Profession. And for suing an Attorney in an inferiour Court; that (they said) was no

(41.)
Attorney.

cause of Action : for who knows whether he will insist upon his privilege or not ? and if he does, he may plead it, and have it allowed.

Fits & al. versus Freestone.

(42.)
Assumpsit.
Supra 206.
pl. 36.
1 Sid. 236.

IN an Action grounded upon a promise in Law, payment before the Action brought is allowed to be given in Evidence upon non Assumpsit. But where the Action is grounded upon a special promise, there payment or any other legal discharge, must be pleaded.

Bringloe versus Morrice.

(43.)
Licence.

IN Trespass for immoderately riding the Plaintiff's Mare, the Defendant pleaded, that the Plaintiff lent to him the said Mare, & licentiam dedit eidem equitare upon the said Mare, and that by virtue of this Licence the Defendant and his Servant alternatim had rid upon the Mare. The Plaintiff demurs. Serj. Skipwith pro Quer'. The Licence is personal and incommunicable ; as 12 H. 7. 25. 13 H. 7. 13. the Dutchess of Norfolk's case. 18 Ed. 4. 14. Serj. Nudigate contra. This Licence is given by the party, and not created by Law, wherefore no Trespass lyeth : 8 Rep. 146, 147. per Cur', the Licence is annexed to the person, and cannot be communicated to another : for this riding is matter of pleasure. North took a difference where certain time is limited for the Loan of the Horse, and where not. In the first case, the party to whom the Horse is lent, hath an interest in the Horse during that time, and in that case his Servant may ride : but in the other case not. A difference was taken betwixt hiring a Horse to go to York, and borrowing a Horse : in the first place the party may set his Servant up ; in the second not.

Term. Pasch. 28 Car. II. in Communi Banco.

Anonymus.

Again upon marriage Covenants with his Wives (44.)
 relations, to let her make a Will of such and such Goods: she made a Will accordingly by her husband's consent, and dyed. After her death, her Will being brought to the Prerogative Court to be proved, a Prohibition was prayed by the Husband, upon this suggestion, that the Testatrix was *fœmina viro cooperta*, and so disabled by the Law to make a Will. Cur'. Let a Prohibition go, *Nisi causa*, &c. North. When a question ariseth concerning the Jurisdiction of the Spiritual Court, as whether they ought to have the Probate of such a Will, whether such a disposition of a personal Estate be a Will or not, whether such a Will ought to be proved before a peculiar, or before the Ordinary, whether by the Archbishop of one Province or another, or both, and what shall be *bona notabilia*; in these and the like cases, the Common Law retains the Jurisdiction of determining; there is no question, but that here is a good surmise for a Prohibition; to wit, that the woman was a person disabled by the Law to make a Will; the Husband may by Covenant depart with his right, and suffer his Wife to make a Will; but whether he hath done so here or not shall be determined by the Law; we will not leave it to their decision: it is too great an invasion upon the right of the Husband. In this case the Spiritual Court has no Jurisdiction at all: they have the Probate of Wills, but a Feme-covert cannot make a Will. If she dispose of any thing by her Husband's consent, the property of what she so dispose of, passeth from him to her Legatee, and it is the gift of the husband. If the Goods were given into another's hands in trust, for the wife; still her Will is but a Declaration of the trust, and not a Will, properly so called. But of things in Action, and things that a Feme-covert hath as Executrix, she may make a Will by her husband's

Baron and Feme. 2 Mod. Rep. 172.

Hob. 17.

3 Cro. 27.
1 Cro. 220.

band's consent : and such a Will, being properly a Will in Law, ought to be proved in the Spiritual Court. In the case in question a Prohibition was granted.

----- *against the Hambrough Company.*

(45.)
London.

The Plaintiff brought an Action of Debt in London against the Hambrough-Company, who not appearing upon Summons, and a Nihil being returned against them, an Attachment was granted, to attach Debts owing to the Company, in the hands of 14 several persons : By Certiorari the cause was removed into this Court ; and whether a Pro- cedendo should be granted or not, was the question.

Serjeant Goodfellow, Baldwin, and Barrell argued, that a debt owing to a Corporation is not attachable. Serjeant Maynard & Scroggs contra. Cur. We are not Judges of the Customs of London ; nor do we take upon us to determine whether a debt owing to a Corporation, be within the Custom of foreign Attachment, or not. This we judge and agree in, that it is not unreasonable that a Corporation's debts should be attached. If we had judged the Custom unreasonable, we could and would have retained the cause : For we can over-rule a Custom, though it be one of the Customs of London, that are confirmed by Act of Parliament, if it be against natural reason. But because in this Custom we find no such thing, we will return the cause. Let them proceed according to the Custom, at their peril. If there be no such Custom, they that are aggrieved may take their remedy at Law. We do not dread the consequences of it. It does but tend to the advancement of Justice ; and accordingly a Pro- cedendo was granted per North Chief Justice, Wyndham & Ellis. Atkyns aberat.

Anonymus.

Anonymus.

PER Cur', if a man is indicted upon the Statute of Recu- (46.)
fancy, Conformity is a good plea: but not, if an Acti. Pope.
on of Debt be brought.

Parten & Baseden's Case.

PArten brought an Action of Debt in this Court against (47.)
the Testator of Baseden the now Defendant, and had Executors:
Judgment. After whose death there was a devastavit returned
against the Defendant Baseden, his Executor: he appeared to
it, and pleaded, and a special Verdict was found, to this ef-
fect, viz. that the Defendant Baseden was made Executor by
the Will, and dwelt in the same house, in which the Testator
lived and died, and that before Probate of the Will he pos-
sessed himself of the Goods of the Testator, prized them, inven-
toried them, and sold part of them, and paid a Debt, and con-
verted the value of the residue to his own use; that afterwards
before the Ordinary he refused, and that upon his refusal admi-
nistration was committed to the Widow of the deceased. And
the question was, whether or no the Defendant should be char-
ged to the value of the whole personal Estate, or only for as
much as he converted.

Serjeant Barrell argued, That he ought to be charged for
the whole, because; 1. He is made Executor by the Will;
and he is thereby compleat Executor before Probate, to all
intents but bringing of Actions. 2. He has possession of the
Goods, and is chargeable in respect of that. 3. He caused
some to be sold, and paid a Debt; which is a sufficient admi-
nistration. There is found to discharge him 1. His refusal
before the Ordinary. But that being after he had so far inter-
meddled, avails nothing: Hensloe's case, 9 Co. 37. An Exe-
cutor de son tort, he confessed, should not be charged for more
than he converted; and shall discharge himself by delivering
over the rest to the rightful Executor. But the case is diffe-
rent

Plowd. 276.

rent of a rightful Executor, that has taken upon him the burden of the Will. The second thing found to discharge him, is the granting of Administration to another : but that is void, because here is a rightful Executor that has administered : in which case the Ordinary has no power to grant administration. Hob. 46. Keble & Osbaston's case. The third thing found to discharge him, is the delivery of the Goods over to the Administrator. But that will not avail him ; for himself became responsible by his having possession, and he cannot discharge himself by delivering the Goods over to a stranger, that has nothing to do with them. If it be objected, that by this means two persons will be chargeable in respect of the same Goods ; I answer, that payment by either discharges both : Cro. Car. Whitmore & Porter's case.

1 Rol. 919.
pl. 2.

The Court was of Opinion, that the committing of Administration in this case, is a mere void act. A great inconvenience would ensue, if men were allowed to Administer as far as they would themselves, and then to set up a beggarly Administrator : they would pay themselves their own Debts, and deliver the residue of the Estate to one that's worth nothing, and cheat the rest of the Creditors. If an Administrator bring an Action, it is a good plea to say, that the Executor made by the Will has administered. Accordingly Judgment was given for the Plaintiff.

Major & Stubbing *versus* Birde & Harrison.

(48.)
Abatement.

Moor 692.

Resolved, that a plea may be a good plea in abatement, though it contain matter that goes in bar ; they relied upon the case in 10 H. 7. fol. 11. which they said was a case in point, and Salkell & Skelton's case, 2 Rolls Reports : and Judgment was given accordingly.

Term. Trin. 28 Car. II. in Communi Banco.

PEr North Chief Justice ; if there are Accounts between two Merchants, and one of them becomes Bankrupt, ^(1.) the course is not to make the other, who perhaps upon stating the Accounts, is found indebted to the Bankrupt, to pay the whole that originally was entrusted to him, and to put him for the recovery of what the Bankrupt owes him, into the same condition with the rest of the Creditors ; but to make him pay that only which appears due to the Bankrupt on the foot of the Account : otherwise it will be for Accounts betwixt them after the time of the others becoming Bankrupt, if any such were. Bankrupts.

Wing & Jackson.

TRespass Quare vi & armis, the Defendant infulum fecit ^(2.) upon the Plaintiff was brought in the County Court ; Court-Ba- and Judgment there given for the Plaintiff. But it was re- ron. versed here upon a Writ of false Judgment, because the County Court, not being a Court of Record, cannot fine the Defendant, as he ought to be, if the cause go against him, because of the vi & armis in the Declaration : but an Action of Trespass without those words will lie in the County Court well enough.

Anonymus.

Anonymus.

(3.)
Dismes.
2 E. 6. c. 13.

A Vicar libell'd in the Spiritual Court for Tythes of young Cattle, and surmised that the Defendant was seised of Land in Middlesex, of which Parish he was Vicar, and that the Defendant had Common in a great Masse called Sedgemore-Common, as belonging to his Land in Middlesex; and put his Cattle into the said Common. The Defendant prayed a Prohibition, for that the Land where the Cattle went was not within the Parish of Middlesex. The same Plaintiff libelled against the same Defendant for Tythes of Willow. Faggots; who suggests to have a Prohibition, the payment of 2. d. a year to the Rector, for all Tythes of Willow. The same Plaintiff libelled also for Tythes of Sheep. The Defendant to have a Prohibition, suggests, that he took them in, to feed, after the Corn was reaped, pro melioratione agriculturæ infra terras arabiles & non aliter.

As for the first of these no Prohibition was granted, because of that clause in 2 Edw. 6, whereby it is enacted, that Tythes of Cattle feeding in a Masse or Common, where the Parish is not certainly known, shall be paid to the Parson, &c. of the Parish where the owner of the Cattle lives.

For the second, they held that a modus to the Rector is a good discharge against the Vicar. For the third, they held that the Parson ought not to have Tythe of the Corn and Sheep too, which make the ground more profitable, and to yield more. Per quod, &c.

Ingram *versus* Tothill & Ren.

(4.)
Herriot.
3 Keb. 785.
2 Mod. 281.

Co. Lit. 471.

R Eplevin. Trevill leased to Ingram for 99 years, if Joan Ingram his wife, Anthony & John Ingram his Sons should so long live, rendring an Periot or 40 shillings to the Lessor and his Assigns, at the election of the Lessor his heirs and Assigns, after their several deaths successive, as they are named in the Indenture. Trevill deviseth the Reversion. John dies, and then Joan dies: and the question was, whether

ther or no a Periot were due to the Devisee upon the death of Joan. The Court agreed that the Abowry was faulty, because it does not appear thereby, whether Anthony Ingram was alive or not at the time of the distress taken; for if he were dead, the Lease would be determined. North. Though Anthony were alive, the Devisee of Trevill could not distrain for the Periot, for that the reservation is to him and his Assigns, and although the Election to have the Periot or 40 s. be given to the Lessor, his heirs or Assigns, yet that will not help the fault in the reservation. Ellis. There is another fault, in the pleading; for it is pleaded that Trevill made his Will in writing; but it is not said, that he dyed so seized; for if the Estate of the Devisor were turned to a right at the time of his death, the Will could not operate upon it. Also it is said, that the Abowant made his Election, and that the Plaintiff habuit noticiam of his Election, but it is not said by whom notice was given: for these causes Judgment was given for the Plaintiff. It was urged likewise against the Abowant, that no Periot could be due in this case, because Joan did not die first: but the course of succession is interrupted; and that a Periot not being due of common right, the words of reservation ought to be pursued: but as to this the Court delivered no Opinion.

Co. Lit. 47.

1 Leon. 2.

Co. Lit. 148.

3 Cro. 50.

3 Co. 2.

Plowd. 193.

431.

*Ognell versus the Lord Arlington Guardian of
Sir John Jacob.*

UPON a Trial at Bar the Court delibered for Law to the Jury, that if there be Tenant by Elegit, of certain Lands, and a Fine be levied of those Lands, and five years with non-claim pass, that the interest of the Tenant by Elegit is bound, according to Saffyn's case 5 Rep. otherwise, if the Land had not been actually extended. Also, that if an Inquisition upon an Elegit be found, the party before entry has the possession, and a fine with non-claim shall bar his right; for before actual entry he may have Ejectione firmæ or Trespass, and so not like to an interse termini.

(5.)

5 Co. 124. a.

Barry & Trebeswycke.

(6.)
Annuity.
2 Inst. 491.
2 Cro. 666.
1 Sid. 146.
1 Keb. 523.
1 Keb. 562.
Co. Lit. 146.2.

If a Parson have a Pension by Prescription, he may either bring an Action at the Common Law, or commence a Suit in the Spiritual Court; but if he brings a Writ of Annuity at the Common Law, he can never after sue in the Spiritual Court, for that his Election is determined.

Wakeman & Blackwell.

(7.)
Tenants.

In a Quare impedit the Defendant pleaded a recovery in this manner, viz. that John Wakeman Grandfather to the Plaintiff was seized in fee of the Mannor, to which, &c. and that a Præcipe was brought against one Prinne & Philpots, adtunc tenentes liberi tenementi, &c. who appeared and vouched John Wakeman, &c. and that this Recovery was to the use of J. S. under whom the Defendant claims.

Hob. 262.

Strode, pro Defendente: it is not necessary that the Tenant in a Common Recovery have a Freehold, at the time of the purchase of the Writ: if he have at the time of the return, it sufficeth. 7 Ed. 3. 42. 7 Ed. 3. 70. Ass. of no. diff. 43 Ed. 3. 21. in these Authorities the person against whom the Præcipe is brought, comes in by right, after the purchase, and before the return of the Writ. But in 26 Ed. 3. 68. there is an example, where the Tenant to the Præcipe comes in by tort; but there is this difference: if he comes to the Land by his own act, be it by right or by wrong, there he makes the Writ good: otherwise if he come to it by act of Law, 8 Ed. 3. 22. a. Formedon, 25 H. 6. 4. the reason why you shall not abate the Plaintiffs Writ by your own act, is because you cannot give him a better.

The demandant here is esopped to say, that there was not a Tenant to the Præcipe in this Recovery; for the Writ is but abatable, if brought against one that is not Tenant: and as long as it stands not abated, but is pleaded to &c. it shall conclude all that are parties and privies, and all claiming under them: 34 Ed. 3. F. tit. droit 39. here is in our case an esop.

estoppel, with a recompence : Wakeman the Grandfather, who was the first Vouchee in this Recovery, might have counter-pleaded the lien and extorted the warranty; but having vouched over, he is past that advantage, and is concluded, being made a party by Voucher.

This being a common Recovery, the Court will do all they can to make it good. A Fine is levied by Dedimus potestatem by Baron and Feme. The Commissioners did not return the examination of the wife; and yet that is the discriminating difference, upon which depends whether the wife shall be bound by the Fine or not : 15 Ed. 4. 28. a Litt. Sect. 670. 6 Ed. 3. 22. a. The Court must needs in this case intend, that Prinne & Philpots came in by conveyance, because Wakeman came in upon the Voucher, which he would not have done, if there had not been a lien. He cited Cro. Jac. 454. Lincoln Colledge case, 3 Rep. 48. & Hob. 262. Duncomb & Wingfield's case. To which Pemberton answered, that tunc tenens is a sufficient averment in the pleading of a Recovery, which is favoured in Law; but it is not good alone, when in the same sentence a matter is set forth, that is inconsistent with it, and plainly contradictory, as in this case; and of that opinion was the Court. The case in Hob. they said was upon a special Verdict, where many things may be intended, which shall not be so in pleading; and in Lincoln Col' case the Writ is said to be brought against one Edw. Chamberlain in one part of the Record, and the Mother is said to be Tenant in another part of the Record, and by the other party; but here in the same sentence uno flatu, there is a flat contradiction.

Burrow & Haggett.

Formedon in the descender. The Defendant pleaded in abatement of the Count, and took these exceptions : (8.)
 1. That the demandant declares that the right descended to him after the death of Leonard, as Brother and heir to Leon. and Son and heir of the Donee; but does not alledge that Leonard died without issue : 8 Rep. 88. Buckmere's case In ancient Registers the clause is eo quod, the issue dyed without issue : Co. Ent. 254. b. & c. Rast. Entr. 365. C. Yelv. 227.
 ff 2 Glasie

Hob. 51.

3 Cro. 347,
348.

1 Sid. 187.

Glasse & Gyll's case. 9 Ed. 4. 36. a man that entitles himself as heir, must shew how he is heir. Seyse contra. The presidents are on our side : and the difference is betwixt a Formedon in the descender, and a Formedon in the remainder or reverter. In the former they do not mention the dying without issue of him, after whose death they claim : for the Count there is in effect only to set out their pedigree ; but in a Formedon in the Remainder or Reverter, it is otherwise : 39 Ed. 3. 27. Old Book of Ent' 339. tit. Formed', bar. plac' 3. Co. Lit. Mandevile's case, 26. b. 7 H. 7. fol. 7. b. there our case is put in express terms ; the exception taken to the Count there by Keble, is the same that is taken to ours here : and there it is over-ruled. North. I have looked into presidents, and find the Count in this case according to them. It is a plain and reasonable difference betwixt a Formedon in the descender, and a Formedon in the remainder or reverter : nor could the demandant be brother and heir to Leonard, if Leonard had left children, &c. Another exception was, that the demandant does not set forth, that he was Son and heir of John, begotten on the body of Jane his wife ; for it was a gift in special tail. But this was over-ruled ; for in the Writ that is set forth, and in the Declaration, after the words filio & hæredi prædict. Johannis, came an (&c.) which (&c.) let the words of the Writ into the Count ; and so it was held good. The Prothonotaries said, that the forms of Counts were accordingly. And Judgment was given to answer over, Nisi causa, &c.

Term.

Term. Mich. 28 Car. II. in Communi Banco.

Blithe versus Hill

DE B C upon an Obligation for the payment of Bond at a day certain. The Defendant plead- (9.)
ed that the Plaintiff, being desirous to have the Accord.
Bond paid before the day, took another Bond 2 Keb. 804.
for the same Sum payable sooner: and that this was in full
satisfaction of the former Bond; upon this Plea the Plain-
tiff took Issue, and it was found against him. And Ser-
jeant Maynard moved, that notwithstanding this Verdict,
Judgment ought to be given for the Plaintiff; for that the
Defendant by his Plea had confessed the Action; and to
say that another Bond was given in satisfaction, is nothing
to the purpose: Hob. 68. so that upon the whole it appears
that the Plaintiff has the right, and he ought to have Judg-
ment, 2 Cro. 139. 8 Co. 93, a. and day was given to them
cause why the Plaintiff should not have Judgment, Vide in-
fra hoc eodem Termino, 225. pl' 14.

Savil against the Hundred of ----

THE Plaintiff in an Action upon the Stat. of Wint. had
a Verdict, and it was moved in arrest of Judg- (10.)
ment, that the Felonious taking is not said to be in the Fresh Suit.
High way, 2 Cro. 469, 675. North. An Action lies upon the 1 Cro. 267.
Stat. of Winton, though the Robbery be not committed in
the High way: to which the Court agreed; and the Protho-
notaries said, that the Entries were frequently so. Per
quod, &c.

Calthrop

Calthrop & Philippo.

(II.)
Sheriffs.

One J. S. had recovered a Debt against Calthrop, and procured a Writ of Execution to Philippo the then Sheriff of D. but before that Writ was executed Calthrop procured a Superfedeas to the same Philippo, who when his year was out, delivered over all the Writs to the new Sheriff, save this Superfedeas, which not being delivered, J. S. procures a new Writ of Execution to the new Sheriff; upon which the Goods of Calthrop being taken, he brings his Action against Philippo, for not delivering over the Superfedeas. After a Verdict for the Plaintiff, it was moved in arrest of Judgment, that the Action would not lie, for that the Sheriff is not bound to deliver over a Superfedeas. 1. Because it is not a Writ that has a return. 2. Because it is only the Sheriff's Warrant for not obeying the Writ of Execution. The Prothonotaries said, that the course was to take out a new Writ to the new Sheriff. Serjeant Strode argued, that the Superfedeas ought to be delivered over; because the King's Writ to the old Sheriff is, *Quod Com' prædict' cum pertinentiis, uno cum rotulis, brevibus, memorandis & omnibus officium illud tangentibus, quæ in custodia sua existunt, liberet, &c.* Reg. 295. & 3 Co. 72. Westby's case. Besides, the Superfedeas is for the Defendant's benefit; and there is no reason why the Capias should be delivered over, which is for the Plaintiff's benefit, and not the Superfedeas, which is for the Defendants. And he said an Action will lie for not delivering over some Writs to the new Sheriff, though those Writs are not returnable: as a Writ of Estrepement. The Court inclined to his Opinion: but it was adjourned to a further day, on which day it was not moved.

Bescawin

Bascawin & Herle *versus* Cooke.

THO. Cook granted a Rent-charge of 200 l. per annum (12.)
 to Bascawin & Herle for the life of Mary Cook, habend' 27 H. 8. c. 10.
 to them, their heirs and assigns, ad opus & usum of Mary, and
 in the Indenture covenanted to pay the rent ad opus & usum
 of Mary. Bascawin & Herle upon this bring an Action of Co-
 venant, and assign the breach in not paying the Rent to them-
 selves, ad opus & usum of Mary. The Defendant demurs :
 1. Because the words in which the breach is assign'd, contain
 a negative pregnant. Baldwin for the Plaintiff ; we assign
 the breach in the words of the Covenant. Cur' accord. 2. Be-
 cause the Plaintiff does not say that the money was not paid
 to Mary, for if it were, it would satisfy the Covenant.
 3. This Rent-charge is executed to Mary by the Stat. of Uses,
 and she ought to have distrained for it, for she having a re- 9 Co. 61.
 medy, the Plaintiffs, out of whom the Rent is transferred
 by the Statute, cannot bring this Action : Whereupon two que-
 stions were made, 1. Whether this remedy by Action of Co-
 venant be transferred to Mary by the Stat. of Uses or not ?
 And 2dly, if not, whether the Covenant were discharged
 or not ? North & Wyndham : When the Statute transfers
 an Estate, it transfers together with it such remedies only
 as by Law are incident to that Estate, and not collateral
 ones. Atkyns accordant. There is a clause in the Statute
 of 27 H. 8. c. 10. §. 4. N. 3. which gives the Cestuy que
 use of a Rent all such remedies, as he would have had, if
 the Rent had been actually and really granted to him : but
 that has place only where one is seized of Lands in trust
 that another shall have a Rent out of them : not where a
 Rent is granted to one to the use of another. They agreed
 also that the Covenant was not discharged. And gave Judg-
 ment for the Plaintiff, Nisi, &c.

Higden *versus* Whitechurch, *Executor*
of Dethicke.

(13.)
Outlawry.

Co. Lit. 384.

Jenk. 37.
Co. Lit. 128. a.

1 Sid. 43.

Audita Querela. The Plaintiff declares, that himself and one Prettyman became bound to the Testator for the payment of a certain sum: that in an Action brought against him he was outlawed: that Dethicke afterward brought another Action upon the same Bond against Prettyman, and had Judgment: that Prettyman was taken by a Cap. ad satisfaciend', and imprisoned, and paid the Debt, and was released by Dethicke's consent: upon this matter the Plaintiff here prays to be relieved against this Judgment and Outlawry. The Defendant protestando that the Debt was not satisfied, pleads the Outlawry in disability. The Plaintiff demurs. Baldw. for the Plaintiff, Non datur exceptio ejus rei, cujus petitur dissolutio. He resembled this to the cases of bringing a Writ of Error or Attaint, in neither of which Outlawry is pleadable. 3 Cro. 225. 7 H. 4. 39. 7 H. 6. 44. Seyse contr. Outlawry is a good plea in Audita querela, 2 Cro. 425. 1 Co. 141. this case is not within the Maxim that has been cited; a writ of Error and Attaint is within it: for in both them the Judgment it self is to be reversed. But in an Audita querela you admit the Judgment to be good: only upon some equitable matter arising since, you pray that no Execution may be upon it: Vide 6 Ed. 4. 9. b. & Jason & Kite's case: Mich. 12 Car. 2. Rot. 385. Adj. Pasch. 13. Cur' accord'. If the Judgment had been erroneous, and a writ of Error had been brought, the Outlawry, which was but a superstructure, would fall by consequence; but an Audita querela meddles not with the Judgment: the Plaintiff here has no remedy, but to sue out his Charter of Pardons.

Blythe *and* Hill, *supra* 221. pl. 9.

THE Case being moved again appeared to be thus, viz. (14.)
 The Plaintiff brought an Action of Debt upon a Bond Action.
 against the Defendant as heir to the Obligor. The Defendant pleaded, that the Obligor, his Ancestor, dyed intestate, and that one J. S. had taken out Letters of Administration, and had given the Plaintiff another Bond in full satisfaction of the former. Upon this Issue being joyned, it was found for the Defendant. It was said of him, that one Bond might be taken in satisfaction for another; and 1 Inst. 212. b. 30 E. 1. 23 Dyer 29. were cited. North Chief Justice: If the second Bond had been given by the Obligor himself, it would not have discharged the former: but here, being given by the Administrator, so that the Plaintiffs security is better'd, and the Administrator chargeable de bonis propriis, I conceive it may be a sufficient discharge of the first Bond. Wyndham accord', else the Administrator and Heir might both be charged. Scroggs accord'. Atkyns. There are many Authorities in the point; and all directly, that one Bond cannot be given in satisfaction of another. So is Cro. Eliz. 623, 697, 716, 727. and many others. But yet I hold that judgment ought to be given for the Defendant; for though it be an impertinent issue, yet being found for him, he ought by the Statute of the 23 H. 8. to have Judgment. If no issue at all had been joyned, it would have been otherwise: 2 Cro. 44, 575. Serjeant Maynard cites 9 H. 6. but that case was before the Statute, so I ground my Judgment upon that point. North. I took it, that unapt issues are aided by the Statute, but not immaterial ones. And so said Scroggs. Judic' pro Defendente, Nisi, &c. Hob. 68, 69. Hob. 69.

Southcot & Stowell.

Intrat' Hill. 25 & 26 Car. 2. Rot. 1303.

(15.)
Remainder
In 27 H. 8. cap.

J. C. Popham
10. Mod. Rep.
207. & 3.
Feb. 7. 84.
41. Freeman.
216. & 225.

Covenant for non-payment of Money. The Case was thus: viz. Thomas Southcot had issue two Sons, Sir Popham and William, and in consideration of the marriage of his Son Sir Popham, covenanted to stand seized to the use of Sir Popham, and the heirs Males of his Body; and for default of such Issue, to the use of the heirs Males of his own Body, the Remainder to his own right heirs. Sir Popham dies, leaving issue Edward his Son, and four Daughters: then Thomas the Father died; and then Edward died without Issue; and the question was, whether Sir Popham's Daughters or William had the better title? Two Points were made, 1. Whether the Limitation of the Remainder to the heirs Males of the Body of the Covenantor were good in its creation, or not? 2. Admitting it to be good Originally, whether it could take effect after the death of Edward, he leaving Sisters, which are general heirs to the Covenantor. North Wyndham and Askyns upon admission of the first Point, were of Opinion for William; and that he should have the Estate, not by purchase, but by descent from Edward; for after the death of the Father, both the Estates in tail were vested in him; and he was capable of the Remainder by purchase: and being once well vested in a Purchaser, the Estate shall afterwards run in course of descent: Scroggs doubted. But they all doubted of the first point, and would advise. V. *infra* Pasch. 29 Car. 2. Post. 237. pl. 3.

Enquest.
6 Co. 53. Co.
Lit 156. a.

It is was said by the Justices in the Countess of Northumberland's Case, That if a Knight be but returned on a Jury, when a Nobleman is concerned, it is not material whether he appear and give his Verdict or no. Also, that if there be no other Knights in the County, a Serjeant at Law that is a Knight, may be returned, and his Priviledge shall not excuse him.

Gayle & Betts.

DEbt upon a Bond. The Defendant demands Oyer (16.)
 of the Bond and Condition; which was to pay forty Commission-
 pounds per annum quarterly so long as the Defendant should
 continue Register to the Arch-Deacon of Colchester; and says
 that the Office was granted to A. B. & C. for their Lives: and
 that he enjoyed the Office so long as they lived, and no lon-
 ger, and that so long he paid the said 40 l. quarterly. The
 Plaintiff replies that the Defendant did enjoy the Office lon-
 ger, and had not paid the Money. The Defendant demurs, Hob. 198.
 supposing the Replication was double. Cur. The Replication Post. 289.
 is not double: for the Defendant cannot take issue upon the
 non-payment of the Money; that would be a departure from
 his plea in bar: so if upon a plea of nullum fecit arbitrium,
 the Plaintiff in his Replication set forth an award and a breach,
 the Defendant cannot take issue upon the breach, for that would
 be an implicate confession of what he had denied before. North
 If the Defendant plead that he did not exercise the Office be-
 yond such a time, till which time he paid the Money, the Plain-
 tiff may take issue, either upon the payment till that time, or
 reply upon the continuance; but if he do the latter, he must
 shew a breach; for the continuance is in it self no breach. Sand. 103.

Ellis & Yarborough.

Action upon the Case against a Sheriff for an Escape. (17.)
 The Plaintiff declares, that one G. was indebted to Sheriffs.
 him in 200 l. and that the Defendant took him upon a Latitat In 23 H. 6.
 at the Plaintiffs suit: and afterward suffered him to escape. cap. 10.
 The Defendant pleads the Statute of 23 H. 6. cap. 10. and Infra 239.
 that he let G. out upon Bail, according to the said Statute, pl. 4.
 and that he had taken reasonable Sureties, A. & B. persons
 having sufficient within the County. The Plaintiff replies
 and traverses, absque hoc, that the Defendant took Bail of
 persons having sufficient within the County. The Defendant
 demurs. Skipwith. The Sheriff is compellable to take Bail.

1 Sid. 96.
10 Co. 101. 2.

If he take insufficient Bail, the course is for the Court to amerce the Sheriff, and not for the Party to have an Action upon the Case: Cro. Eliz. 852. Bowles & Lassell's Case, and Noy 39. if the Sheriff takes no Bail, an Action lies against him: and all Actions brought upon this Statute are founded upon this suggestion: 3 Cro. 460. Moor 428. 2 Cro. 280. but if he take insufficient Bail, it is at his own peril; and no Action lies: the Sheriff is Judge of the Bail, and the sum is at his discretion: Cro. Jac. 286. Villers & Hastings: and so are the number of the Persons, he may take one, two or three, as he pleaseth. He cited Cro. Eliz. 808. Clifton & Web's Case. Besides, the Traverse is pregnant, for it implies that the persons have sufficient out of the County; and the Sheriff is not bound to take Bail only of persons having sufficient within the County.

Serjeant Barrel contra.

The Court not agreeing in their Opinions upon the matter of Law, it was put off to the next Term to be argued.

Baldwin for the Defendant, cited 3 Cro. 624, 152. 2 Cro. 286. Noy 39. Rollst. Escape, 807. Moor 428. that the Sheriff is compellable to let him to bail, and is Judge of the sufficiency of the Sureties. The Statute was made for the Prisoners benefit, for the mischief before was, that the Sheriff not being compellable to bail him, would extort money from him to be bailed: and the word sufficient is added in favour of the Sheriff; and so are the words within the County. The Sheriff is not compellable to assign the bail Bond; and then, if the Plaintiff cannot have the security given by the Defendant for his appearance, it is all one to him whether it be good or no.

Strode contra. Why must the Sheriff always aver that he has taken sufficient Sureties, if their sufficiency be not material? Why is an Action allowed to lye, if the Sheriff take no Sureties at all, since according to my Brothers Opinion, the party has no interest in them? If the Law be as they argue, the Statute has left the Plaintiff in a worse condition than he was at the Common Law; for it has deprived him of the remedy that he had before; and the Amerciaments belong not to him, but to the King.

2 Sand. 60.

Cur. The sufficiency of the Bail is not material: it is only for the Sheriffs own security. If he take no bail at all, an Action lies against him, for then he does not act by colour of this Law, Atkyns. The Statute is not advantageous to the Plaintiff

Plaintiff at all, unless the Sheriff let go the prisoner without taking any bail; and then he must render treble damages. And by the Opinion of the whole Court Judgment was given for the Defendant.

Moor *versus* Field.

A Custom was alledged, that all persons in a Parish (18.) that had Sheep upon their Ground on Candlemas-day, Tythes. should be discharged of Tythes of all Sheep that should be upon their ground after in that year, upon payment of full Tythes for all the Sheep that were there upon that day; and this was adjudged an unreasonable Custom. Serjeant Turner argued for it, and cited Rolls Abr. 2 part, 647, 648.

Term. Hil. 28 & 29 Car. II. Communi Banco.

*Strode versus l'Evelq; de Bath & Wells, and
Sir George Horner and Masters.*

(19.)
Presentati-
on.

QUare Impedit, the Plaintiff intitles himself by virtue of a Grant of the next Avoidance made by Sir George Horner, and counts that Sir George was seized in Fee of the Manor of Dowling; to which the Abbotsdon was appendant, and presented J. S. who was admitted, instituted, &c. and that then he granted the next Avoidance to the Plaintiff, and that J. S. died, and it belongs to him to present.

Serjeant Barton. The Plaintiff has failed in his Count, he says, That Sir George was seized, and presented, but he does not say, That he presented tempore pacis, F. N. B. 33. Hob. 102. 6 Co. 30. 1 Inst. 249. F. N. B. 31. 5 Co. 72. Vaugh. 53.

Strode. When the Plaintiff makes his Title by a Presentation, he ought to say, That it was tempore pacis; but Sir George's Title is, by reason of his being seized of the Manor of Dowling, to which the Abbotsdon is appendant. So that the difference as to that, will be betwixt an Abbotsdon in gross and an Abbotsdon appendant.

Cur. When a Man shews a precedent Right, and then alleges a Presentation, in pursuance of that Right, as in this Case the Plaintiff does in Sir George Horner, there it needs not be alleged to have been tempore pacis; but where no Title is alleged, so that the Presentation only makes the Title, there it must be pleaded tempore pacis.

Davies and Cutt.

Davies, as Administrator to Eliz. B. a Feme Covert, brings (20.)
 an Action of Debt upon a Bond against Cutt. The De- Baron and
 fendant pleads, That Administration of the Wives Goods Feme.
 ought de jure to be committed to the Husband, who was then In 21 H. 8.
 alive: upon this there was a Demurrer, and it was resolved cap. 5. Sect. 3.
 for the Plaintiff, for he is rightful Administrator till his Let- N. 6.
 ters of Administration are repealed. 29 Car. 2. cap. 3. §. 4 Co. 51.
 25. N.

James and Johnson.

Trespas. For taking and driving away some Beasts of (21.)
 the Plaintiff, the Defendant justifies, for that he and Toll.
 all they whose Estate he has in such a Manor (the Manor of
 Blythe) have had a Toll for all Beasts driven over the said
 Manor, viz. a halfpenny a Beast, if under twenty; and if above
 then four pence a score. Issue being joined upon this justifica-
 tion, a special Verdict was found, viz. That the Manor afore-
 said was parcel of the Possessions of the Priory of Blythe, that
 the Priory had by Prescription such a Toll, as appurtenant to
 the said Manor: that by the dissolution it came to the Crown,
 and so to Sir Gervase Clifton, and at last to one Bingley, in
 whose Right, as Servant to him, the Defendant justifies:
 but then they conclude, that if the Defendant may entitle
 himself to it by a que Estate, they find for the Defendant; if
 not, then for the Plaintiff.

Serjeant Baldwin for the Plaintiff. It does not appear,
 whether the Toll which the Defendant claims, be a Toll-^{2 Roll. 525.}
 thorough, or a Toll-traverse, or what sort of Toll it is. A Ant. 48.
 Toll-thorough is against common Right, because it is to
 be taken in the King's High-way. And no Prescription can
 be for it, unless he that claims it, shew that the Sub-
 ject has some advantage by it. And when a Man claims a
 Toll-traverse, he must lay it to be for a way over his own
 Freehold, Keil 148. Statham, Toll 2. Pl. 236. Moor 574.
 Cro. Eliz. 710. Keil. 152. A Toll supposeth a Grant from the
 Crown,

Crown, and therefore when the Manor of Blythe came to the Crown, the Toll was disjoyned from the Manor, and became in gross. Nor can a Toll be appendant to a Manor, nor claimed by a que estate.

9 Co. 25. a.

Serjeant Maynard. The Jury have found exactly whatever the Defendant has disclosed in his Plea, and have made a special conclusion upon a point of Pleading. Toll may be appurtenant to a Manor, as well as any other profit a prendre. Nor does it become in gross by the Manor coming to the Crown. The difference is, as to that, betwixt things that had a being in the Crown, before they were granted out to Subjects, and things which had not, 9 Co. The Case of the Abbot of Strata Marcella. There is no such legal difference between a Toll-thorough and a Toll-traverse, as has been offered: the words are used promiscuously in our Books. A Toll-thorough may be by Prescription, without any reasonable cause alledged of its commencement: for having been paid time out of mind, the true cause of its beginning, in the intendment of the Law cannot be known. And for the que Estate; indeed a thing that lies in Grant, cannot be claimed by a que Estate, directly by it self, but it may be claimed as appurtenant to a Manor, by a que Estate in the Manor, &c. Cur' accord. and gave Judgment for the Defendant. Atkyns. When Toll is claimed generally, it shall be intended Toll-thorough, and so is the Case in Cro. Eliz. 710. Smith & Sheppherd.

Co. Lit. 121. a.
10 Co. 59.

Lord Townsend *versus* Hughes.

(22.)

AN Action upon the Statute de Scandalis Magnatum, for these words, viz. My Lord Townsend is an unworthy Person, and does things against Law and Reason. Upon Issue Not Guilty, there was a Verdict for the Plaintiff, and four thousand pounds damages given. The Defendant moved for a new Trial, because of the excessiveness of the damages: and a President was cited of a new Trial granted upon that ground and no other. And Atkyns was for granting a new Trial. North, Wyndham and Scroggs contra, for that the Jury are the sole Judges of the damages.

At

At another day it was moved in Arrest of Judgment, That the words are not actionable: And of that Opinion was Atkyns. But North, Windham & Scroggs contra. And so the Plaintiff had Judgment.

Atkyns. The occasion of the making of the Statute of 5 Rich. 2. appears in Sir Robert Cotton's Abr. of the Records of the Tower, fol. 173. Numb. 9, 10. he says there, That upon the opening of that Parliament, the Bishop of St. David's in a Speech to both Houses declared the Causes of its being summoned, and that amongst the rest one of them was to have some restraint laid upon Slanderers, and sowers of Discord; which sort of Men were then taken notice of to be very frequent. *Ex malis moribus bonæ Leges.*

The Preamble of the Act mentions false News and horrible Lyes, &c. of things, which by the said Prelates, &c. were never said, done nor thought. So that it seems designed against telling Stories by way of News concerning them. The Statute does not make or declare any new Offence. Nor does it inflict any new Punishment. All that seems to be new is this, 1. The Offence receives an aggravation, because it is now an Offence against a positive Law, and consequently deserves a greater Punishment; as it is held in our Books, That if the King prohibit by his Proclamation a thing prohibited by Law, that the Offence receives an aggravation by being against the King's Proclamation. 2. Though there be no express Action given to the Party grieved, yet by Operation of Law the Action accreus. For when ever a Statute prohibits any thing, he that finds himself grieved, may have an Action upon the Statute 10 Co. 75. 12 Co. 100. there this very Case upon this Statute was agreed on by the Judges. So that that is the second new thing, viz. a further remedy, An Action upon the Stat. 3. Since the Stat. the party may have an Action in the tam, quam, which he could not have before. Now every Lye or Falsity is not within the Statute, it must be horrible, as well as false. We find upon another occasion such a like distinction; It was held in 12 Co. 83. That the High Commission Court could not punish Adultery; because they had Jurisdiction to punish enormous Offenders only. So that great and horrible are words of distinction.

Again, it extends not to small matters, because of the ill consequences mentioned; Debates and Discord betwixt the

said Lords, &c. great Peril to the Realm, and quick subversion and destruction of the same. Every word imports an aggravation. The Statute does not extend to words that do not agree with this Description, and that cannot by any reasonable probability have such dire effects. The Cases upon this Statute are but few and late, in respect of the antiquity of the Act. It was made Anno 1379. For a long time after we hear no tydings of an Action grounded upon it. And by the reading it one would imagine that the Makers of it never intended that any should be. But the Action arises by operation of Law; not from the words of the Act, nor their Intention that made it. The first Case that we find of an Action brought upon it, is in 13 H. 7. which is 120 years after the Law was made: so that we have no contemporanea expositio, which we often affect. That Case is in Keil. 26. The next in 4 H. 8. where the Duke of Buckingham recovered 40l. against one Lucas, for saying that the Duke had no more Conscience than a Dog; and so he got Mony, he cared not how he came by it. He cited other Cases, and said he observed, That where the words were general, the Judges did not ordinarily admit them to be actionable; otherwise, when they charged a Peer with any particular Miscarriage. Serjeant Maynard observed well, That the Nobility and great Men are equally concerned on the Defendants part: for Actions upon this Statute lie against them, as well as against the meanest Subject. Asses of Parliament have been tender of racking the Kings Subjects for words. And the Scripture discourtenances Mens being made Transgressors for a word. I observe that there is not one Case to be met with, in which upon a motion in arrest of Judgment, in such an Action as this, the Defendant has prevailed. The Court hath sometimes been divided, the matter compounded: the Action has abated by Death, &c. but a positive Rule that Judgment should be arrested we find not. So that it is time to make a President and fix some Rules according to which Men may demean themselves in converse with great persons. Misera est servitus, ubi jus est vagum. Since we have obtained no Rules from our Predecessors in Actions upon this Statute, we had best go to the same Rules that they did in other Actions for words. In them, when they grew frequent, some bounds and limits were set, by which they endeavoured to make the Law certain. These Actions now encrease. The
stream

stream seems to be running that way. I think it is our part to obviate the mischief. So he was of Opinion, That the Judgment ought to be arrested; but the Court gave Judgment for the Plaintiff.

North. There are three sorts of Hab. Corp. in this Court, (23.)
 1. Hab. Corp. ad respondendum, and that is, when a Man Hab. Corp.
 hath a Cause of Suit against one that is in Prison, he may bring him up hither by Hab. Corp. and charge him with a Declaration at his own Suit. 2. There is a Hab. Corp. ad faciendum & recipiendum, and that Defendants may have, that are sued in Courts below, to remove their Causes before us. Both these Hab. Corp. are with relation to the suits properly belonging to the Court of Common-Pleas. So if an inferior Court will proceed against the Law in a thing of which we have Conscience, and commit a Man, we may discharge him upon a Hab. Corp. this is still with relation to Common-Pleas. A third sort of Hab. Corp. is for privileged Persons. But a Hab. Corp. ad subjiendum is not warranted by any Presidents that I have seen. Prae. Regist. 282.

Term. Pasch. 29 *Car.* II. in Communi Banco.

Hall & Booth.

(1.)
Bayl.

NOrth. In Actions of Debt, &c. the first Process is a Summons; if the Defendant appears not upon that, a Cap. goes, and then we hold him to Bail. The reason of Bail is upon a supposition of Law, that the Defendant flies the Judgment of the Law. And this supposition is grounded upon his not appearing at the first. For if he appear upon the Summons, no Bail is required. And this is the reason, why it is held against the Law for any inferior Court to issue out a Capias for the first Process. For the liberty of a Man is highly valued in the Law, and no Man ought to be abridged of it, without some default in him.

(2.)
Taxes,
1 Vent. 367.
Ant. 194.
Supra 194.
Pl. 25.
2 Inst. 489.

A Church is in decay, the Bishop's Court must proceed against the whole Parish to have it repaired: they cannot rate any particular person towards the repair of it. But the Church-wardens must summon the Parish; and that needs not be from house to house, but a general publick Summons at the Church is sufficient: and the major part of them that appear, may bind the Parish. If the Church and Chancel be out of repair, the Parishioners are only chargeable to be contributory towards the Repairs of the Navis Ecclesiæ. If a Libel be against the Parish for not repairing the Church, though the word Ecclesia may include the Chancel, yet we will not grant a Prohibition. If a Tax be set by the major part of the Parish, pro reparatione Ecclesiæ, it is well enough: and if afterwards any part of the Money raised be laid out upon the Chancel, the Parish ought not to allow it upon the Church-wardens accounts. But if a Tax be imposed expressly for the Repair of the Body of the Church, and of the Chancel, we will not suffer them to proceed. Or if a Libel be against a Parish for not repairing the Navis Ecclesiæ and the Chancel, we will prohibit them.

them. If a Church be down, and the Parish encreased, so that of necessity they must have a larger Church, the major part of the Parish may raise a Tax for the enlarging it, as well as the repairing it, per Cur. It was insisted on at the Bar, that to a Tax for the encreasing of a Church, the consent of every Parishioner must be had. But the Court was of another Opinion.

Southcote & Stowell, *super Mich.* 28 Car. 2.

Baldwin for the Plaintiff, Thomas the Covenantor may be said to take an Estate for Life by implication, and then it will be all one as if an express Estat for Life had been limited to him, with a Remainder to his Heirs Males, which would be a fee-tail executed in himself: and if so, then William has a good Title: 1 And. 265. the Lord Pager's Case, 1 Co. 154. in the Rector of Chedington's Case, Fenwyke and Mitford's Case, Moor 284. 1 And. 256. And Cro. Eliz. 321. Hodgekinson and Wood's Case, 1 Cro. 23. Lane and Panel's Case, 1 Rolls.

(3.)
Supra 226.
pl. 15.
In 27 H. 8.
cap. 10.
Supra 121. pl.
27.
Ant. 160.
Co. Lit. 22.
2 R. 91.

But if this will not hold, then William may take an Estate by way of a future springing Use, for this he quoted 2 Rolls Uses, p. 794. Mills and Parsons, numb. 7.

If neither of these ways will serve, yet the Remainder to the Heirs Males of Thomas, may vest in Edward (for Sir Popham died in the Covenantor's life-time) and William may take by descent, as special Heir per formam doni, though he be not Heir of the Body of Edward, in whom the Remainder first vests.

Stroud cont. The Limitation of a Remainder in tail to the Heirs Males of the Covenantor, is bad in its original creation. For no man can make himself or his own Heirs Purchasers, without departing with the whole fee-simple, Dyer 309. b. 42 Aff. 2. 1 H. 5. 8. per Skrene, 24 Ed. 3. 28. Bro. Estates 23. 1 H. 8. 65. per Hull, 42 E. 3. 5. Br. Estate 66. Dyer 69. b. 2 H. 5. 4. b. 1 H. 5. 8. 14 H. 4. 32. a. Cook 2 Inst. 333. 1 Inst. 22. b. 32 H. 8. Bro. Livery. 61. But all these Cases are of Estates passed by Conveyance at Common Law, and not by way of Use. But Uses are directed by

by the Rules of the Common Law, and as to the vesting of them differ not from Estates conveyed in possession, 1 Co. 138. Chudleigh's Case. No favourable construction ought to be made for Uses against a Rule of Law. The Stat. of H. 8. seems intended to extirpate all private Uses, and was in restitution of the Common Law. He cited the Earl of Bedford's Case, 1 Co. 130. a. Poph. 3 & 4. & Moor 718. and Fenwyke and Mirford's Case, 1 Inst. 22 b. If Thomas took any Estate by this Settlement, he took a Fee-simple. For no Estate being limited to him, if he took any, the Law vested it in him. Now the act of Law will not settle in him an Estate Tail, which is a fettered Estate, but a Fee-simple, if any thing. And the rather, because the reason of it must be upon a supposition, that the old Use continues still in him, being never well limited out of him. Then he argued, that admitting the limitation to be good, yet since it vested in Edward as a Purchaser, it is spent by his dying without Issue.

Co. Lit. 26. b. But North, Wyndham and Atkins were of Opinion, That if an Estate limited to a Man and the Heirs of the Body of his Father, vest in him, be it either by descent or purchase, that if he dye without issue, it shall go to his Brother, &c. so that in this Case, if the Remainder to the Heirs Males of Thomas ever vested in Edward, it comes to William, as Heir Male of the Body of Thomas, and he is a special Heir to take by descent.

Ant. 161.
1 Vent. 381. 2. They agreed that at the Common Law a Man could not make his right Heir a Purchaser, without parting with the whole Fee; but that by way of Use he might: Creswold's Case in Dyer is of an Estate executed. They agreed the Limitation of the Remainder in this Case to be good, and that it vested in Edward, as a Purchaser.

North. It cannot take effect as a springing use; because where the Limitation is of a Remainder, the Law will never construe it so, as to support it any other way. This (he said) he had known resolved in one Cutler's Case in the Kings-Bench.

Scroggs agreed to the Judgment, but said he went contrary to the Books in so doing: which go upon nice and subtle Differences, little less than Metaphysical.

Justice *versus* Whyte.

IN an Action of Debt against the Defendant as Executor to John Whyte, the Defendant pleaded, That John did make a Will, but made not him Executor, and that the said John had bona notabilia in divers Diocesses, and that the Archbishop of Canterbury committed Administration to the Defendant, and concluded in bar, to which there was a demurrer.

(3.)
Executors.

Serjeant Turner. 1. This is a Plea in abatement only, and the Defendant has concluded in bar; Cro. Eliz. 202. 11. Co. 52. Iham & Hitchcot. 2. The Defendant does not traverse, absque hoc, that he ever administered as Executor, 20 H. 6. 1. b. per Fortescue. 3. The Defendant does not shew when Administration was committed to him: for if it were committed hanging the Writ, it will not abate it, 21 H. 6. 8. 5 H. 5. 10, 11. Br. tit. Executors 7. 4. Hob. 49. 4. The Defendant does not lay it expressly that John Whyte died intestate: but only says that he made a Will, but did not appoint him, the Defendant to be his Executor by that Will, and that Administration was granted to him. Now although the Defendant was not made Executor by the Will, yet he might have been made so, by a Codicil annexed to the Will, Rolls Rep. 2. part. 285. 5. He says not in what Province, the bona notabilia were: and perhaps they were in the Province of York. The Court gave Judgment for the Plaintiff, nisi causa, &c. chiefly for the first and fourth Reasons.

Page & Tulse.

Midd', sc. Henricus Tulse nuper de Lond' Miles, & Robertus Jefferies nuper de Lond. Miles, nuper Vicecom' Sheriff. Com' prædict' attachiati fuer' ad respondendum Thomæ Page de placito transgressi. super casum, &c. & unde idem Tho. per Bale Attornatum suum queritur, quare cum quidam Sam. Wadham, (4.)
Action on the Case.
Retorn.
Supra 227.
pl. 17.

ham, alias Waddam, Term. Sanct. Trin. Anno Regni Dom. Regis nunc vicesimo sexto, & antea indebitatus fuisset eidem Tho. Page in 34 libris monetæ Angliæ, idemque Tho. pro obtentione earund' eodem Term' Sanct' Trin. anno vicesimo sexto supradict' debito modo prosecut' fuisset extra Cur' Dom. Regis nunc coram ipso Rege (eadem Cur' apud Westmonast' in præd' Com' Midd' tunc existente) quoddam præcept' ipsius Domini Regis versus præd' Samuelem, Vicecom' Midd' direct' per quod eid' tunc Vicecomiti præcept' fuit, quod caperet præfatum Samuelem, si &c. & eum salvo, &c. ita quod haberet corpus ejus cor' dict' Dom. Rege apud Westmonast' die Veneris prox' post tres septimanas Sancti Mich. prox' sequent' ad respond' eidem Tho. de placito transgr' ac etiam billæ ipsius Tho' versus prædict' Sam' pro triginta quatuor libris super assumptionem secund' consuetud' Cur' dict' Dom' Regis cor' ipso Rege exhibend' & quod idem Vicecomes haberet ibi tunc præceptum illud, &c. quod quidem præceptum idem Thomas postea & ante return' ejusd', scil' quarto die Jul. anno vicesimo sexto suprad' apud Westmonast' in Com' præd' præfat' Henric' & Roberto tunc Vicecom' prædict' Com' Midd' deliberavit, ea intentione quod prædict' Samuel virtute præcepti illius caperetur & arrestaretur, & ad præd' diem return' ejusdem in dict' Cur' dict' Dom' Regis coram ipso Rege secund' consuetud' ejusdem Cur' custodiæ Marischalli Marischalcie Dom' Regis cor' ipso Rege committeretur, ad intentionem quod idem Tho. versus præfat' Samuel' custodiæ ejusdem Marischalli Marischalcie sic commissum, & in custod' sua existent' secund' consuetudinem dict' Cur' dict' Dom' Regis coram ipso Rege per bill' ipsius Tho. versus præd' Samuel' in eadem Cur' exhibend' in placito transgressionis super casum super assumptionem ipsius Sam. pro præd' 34 libris eid. Tho. solvend' & pro recuperatione earund' narraret & implacitaret, & quod præd' Sam. antequam ipse ab hujusmodi custod' præd' Mariscall' Marischalcie deliberetur aut ad largum ire dimitteretur, imponeret in eadem Cur' in præd' placito transgressionis super casum sufficientes manucaptos eid' Tho. inde responsur' secund' consuetudinem Cur' illius, virtute cujus quidem præcepti prædictus Henricus & Robertus postea & ante return' ejusdem, scil' 14 die Jul' anno 26 supradict' tunc Vicecom' Com' præd' ut præfertur, existentes præfat' Samuel' apud Westmonaster' prædict' in Com' prædict', ceperunt & arrestaverunt, & ipsum Samuel' in custodia sua ex causa prædict' habuerunt & detinuerunt

nuerunt, præd. tamen Henricus & Robertus, officii sui Vicecom. debitum in vera & iusta executione præcepti istius, iis, ut præfertur, direct' & deliberat', minime curantes, sed machinantes ipsum Thomam minus rite prægravare, & in prosecutione sectæ suæ præd. penitus frustrare, & de assentione & obtentione præd' 34 librarum omnino impedire, præd' Samuellem in custodia sua in forma præd. detent' existent' (eodem Thoma de præd. 34 libris seu aliquo denario inde minime satisfacto) sine licentia & contra voluntatem ipsius Thomæ vicesimo secundo die Septembris Ann. 26 supradicto, apud Westm' præd. extra custodiam ipsorum Henrici & Roberti tunc Vicecom' Com' præd' existent' ad largum ire quo voluit libere & voluntarie ire & evadere permisérunt, & nihilominus ad præd. diem returni præcepti præd. ipsi præd. Henricus & Robertus Vicecom' præd' Com' Midd', ut præfertur, existentes, in præd. Cur' dicti Dom' Regis, coram ipso Rege apud Westmonaster' præd' in ipsius Tho. grave dampnum & præjudiciu falso & fraudulenter returnaverunt præceptum præd' in forma sequente, viz. quod ipse virtute cuiusdam brevis sibi direct' cepisset corpus præd' Samuelis, cuius quidem corpus ad diem & locum in eodem præcept' content' coram dict' Domino Rege parat' habuerunt, prout per idem præcept' sibi præcipiebatur, ubi revera præd' Henricus & Robertus corpus prædicti Samuelis, ad locum in præcept' prædict' content' non parat' habuerunt juxta exigentiam præcept' prædict. & return' suum prædict. sed prædictus Samuel post evasionem suam præd' seipsum ad loca eidem Thomæ penitus incognita elongavit & retraxit, quorum prætextu idem Tho. non solum in prosecutione sectæ suæ prædictæ manifesto retardatus existit, verum etiam de obtentione prædictarum 34 librarum ei, ut præfertur debet' omnino impeditus & defraudatus existit, ad dampnum ipsius Tho. 40 librarum & inde producit sectam.

Et prædictus Henricus & Robertus per Joh Tister Attornatum suum veniunt & defendunt vim & injuriam quando, &c. & dicunt quod præd. Thomas actionem suam prædictam inde versus eos habere seu manutenere non debet, quia dicunt quod cum per quendam Actum in Parlamento Domini Henrici nuper Regis Angliæ, &c. sexti post Conquestum, apud Westmonaster' in Com' Midd' 24 die Februarii Anno Regni sui 23 Tent' editum, inter alia inactitatum existit auctoritate ejusdem Parlamenti quod Vicecomes, Sub-vicecomes,

Clericus Vicecom' Seneschallus five Ballivus Franchesiæ vel Ballivus five Coronator' non caperet aliquid colore Officii per ipsum nec per aliquam personam ad ejus usum de aliqua persona pro confectione alicujus return' five panel. & pro copia ejusd. panel. præterquam 4 denar', & quod præd. Vicecomes & omnes alii Officiar' & Ministri præd. emitterent extra prisonam, Angl. **should let out of prison**, omnimodas personas per ipsos vel eor. aliquos arrestat. seu existent. in eor. custodia vigore alicujus brevis billæ five warrant. in aliqua actione personali vel causa indictamenti pro transgressionem, super rationabili securitate sufficientium personarum habentium sufficiens infra Com' ubi tales personæ sint, ad ballivum five manucaptionem tradit. ad custodiend. dies suos in talibus locis, prout præd. brevia, billæ five warranta requirerent, tali persona five personis quæ fuit vel forent in eorum custodia per condemnation. execution' cap. utlagatum five excommunicat' & pro securitate pacis, & omnibus talibus personis quæ forent commis. ad custod. per speciale mandatum aliquorum Justiciariorum, & vagrantibus recusantibus ad serviend. secund. formam Statuti de laboratoribus tantummodo exceptis, prout per actum prædict. plenius apparet, & iidem Henricus & Robertus ulterius dicunt quod ipsi 14 die Julii anno Regni dicti Dni. Regis nunc, &c. 26. supradict. in dicta narratione superius specificat' iidem Henr. & Roberto tunc Vicecom' Com' præd. existentibus, apud Paroch. S. Clementis Dacorum in Com' præd' ceperunt & arrestaverunt præd. Samuelem Wadham virtute præcepti præd' in narratione præd. superius specificat. ac ipsum ad prisonam dicti Dom' Regis sub Custodia Vicecom. Com. præd. tunc existent. tunc & ibidem commiserunt, prædictoque Samuele sub custodia præd' Henr. & Roberti existent' pro eadem causa & pro nulla alia causa, præd. Sam. Wadham postea & ante return. præcepti illius, scil. præd. decimo quarto die Julii Anno vicesimo sexto supradicto apud Paroch. præd' in Com' præd. invenit & obtulit præd. Henrico & Roberto ad tunc Vicecom' Com. præd. existentibus rationabilem securitatem sufficientium personarum habentium sufficiens infra Com' præd' Middlesex ad servandum diem suum præd' in præcepto præd' superius specificat. ad respondendum præfato Tho. de placito transgressionis ac etiam billæ ipsius Tho. versus præfat' Samuelem pro triginta quatuor libris super assumptionem secund. consuetudinem Cur' ipsius Dni. Regis coram ipso Rege exhibend' secundum exigentiam præcepti illius, viz. Willielmum King de Paroch.

roch. Sancti Martini in Campis in Com' Middlesex Gen' & Tho. Williams de eadem Paroch. in Com' præd' Taylor, qui quidem Willielmus King & Tho. Williams eundem Samuelem ad tunc manucapere obtulerunt quod ipse idem Sam. Wadham compareret coram dicto Dno. Rege apud Westm. die Veneris prox. post tres septimanas Sancti Mich. prox. sequent. ad respondend' præfat' Tho. Page de placito transgressionis & billæ præd. in narratione præd. superius specificat' secundum formam & effectum actus præd' ; & iidem Henr. & Robertus ulterius dicunt, quod postea & ante returnum præcepti præd. scil. præd. decimo quarto die Julii Ann. vicesimo sexto supradicti iisd' Henr. & Roberto nunc Vicecom. Com. præd. existent. apud Paroch. Sci. Clementis Danor' præd. vigore Statut. præd. cep. de præfat. Samuele rationabilem securitatem præd', viz. Willielmum King & Tho. Williams qui quidem Willielmus King & Tho. Williams iisdem die & anno apud Paroch. præd. Sancti Clementis Danor' in Com' præd' per quoddam scriptum suum obligatorium sub sigil' præd' Willielmi King & Tho. Williams cujus dat. est decimo quarto die Julii anno vicesimo sexto supradict' concessissent & quilibet eorum concessit se teneri præfat. Henric. & Robert. ut Vicecom' Com. præd. in summa 70 librar' bonæ & legalis monetæ Angliæ cum conditione eidem Script. obligator' subscript' quod præd' Samuel compareret coram dicto Dno. Rege apud Westm. præd. die Veneris prox. post tres septimanas Sci. Michaelis prox. sequent. ad respondend' præfat. Tho. Page de placit' transgressionis & billæ præd. secundum exigentiam præcepti præd' & superinde ad tunc & ibidem emisérunt præfat' Sam' extra prisonam præd' secundum formam Statuti præd. ut eis bene licuit, quæ est eadem ad largum ire permissio præd. unde præd' Tho. Page superius versus eos queritur & ulterius iidem Henr' & Robert' dicunt quod ipsi postea scil. ad diem returni ejusdem præcepti coram dicto Dno. Rege apud Westm' præd' iisdem Henr' & Robert. tum Vicecom' Com. præd' existent. returnaverunt præcept. præd. quod ipsi virtute præcepti præd. cepissent præfat. Samuelem cujus corpus coram dicto Dom' Rege ad diem & locum in eodem præcept. content. parat. habuerunt, prout per idem præcept. præcipiebatur, & hoc parati sunt verificare, unde petunt iudicium & damna sua occasione præd' sibi adjudicand'.

Et præd' Tho. Page dicit quod ipse per aliqua per prædict' Henric. & Robert. superius placitando allegat. ab actione sua præd. versus præd. Henr. & Robert. habend. præcludi non debet,

quia protestando quod prædict. Henr. & Robert. non ceperunt securitatem sufficientium personarum pro comparentia prædict. Samuelis ad diem & locum in præcepto præd. superius specificat. prout præd. Henr. & Robert. superius placitando allegaverunt, pro placito idem Thom. dicit quod iidem Henr & Robert. corpus præfati Samuelis ad diem & locum in præcept. præd. content. cor dicto Dno. Rege non parat. habuerunt juxta exigentiam præcepti prædict. & returnum suum prædict. & hoc paratus est verificare, unde petit judicium & damna sua occasione præmissorum sibi adjudicari.

The Defendants demur to this replication, and the Plaintiff joins in demurrer.

Ante 57.

Serjeant Strode pro Defendente. Before the Statute of Westm. 2. cap. 10. no man could make an Attorney without the King's Writ de Attornato faciendo : and there was no other return at the Common Law than cepi corpus, or non est inventus. Vide 32 H. 6. 28. The Statute of 32 H. 6. doth not alter the Return. The design of that Statute is only to provide for the Defendants ease, and against the extortion of Sheriffs and their Officers : so that the Sheriff being obliged to return a Cepi, and yet to let the Defendant to bail, there can be no reason why he should be charged for not having the body at the day. He cited Langton & Gardnerscase Cro. Eliz. 460. Barton & Aldworth : Cro. Eliz. 624. in Bowles & Laffel's case, ibid. 852. The Sheriff took bail according to this Statute, and returned a languidus in prisona, though the Defendant was at large : resolved that no Action lay against the Sheriff. Trin. 13 Jac. Rolls Abr. 1. part 92. no Action lies against the Sheriff for not having the body at the day, because he is compellable by the Statute to let him to bail : and so he said it was resolved in a case between Francklyn & Andrews Br. 24. Car. 1. but adjudged for the Plaintiff upon the insufficiency of the pleading.

Serjeant Conyers for the Plaintiff. I agree that an Action of Escape will not lie against the Sheriff, because he is compellable to let him to bail : but this is an Action at the Common Law for a false Return ; which if it should not be maintainable, the design of the Statute would be defrauded : for the Plaintiff cannot controul the Sheriff in his taking bail, but he may take what persons and what bail he pleaseth : and if he should not be chargeable in an Action for not having the body ready, the Plaintiff could never have the effect of his Suit :
and

and although the Sheriff be chargeable, he will be at no prejudice; for he may repair his loss by the bail-bond: and it is his own fault if he takes not security sufficient to answer the Debt. The last clause in the Statute is, That if any Sheriff return a Capi corpus or reddidit se, he shall be chargeable to have the body at the day of the Return, as he was before, &c. that (if) implies a Liberty in the Sheriff not to return a Capi corpus or reddidit se. But notwithstanding, by the opinion of North Chief Justice, Wyndham & Atkyns Justices, the Plaintiff was barred. Bowles & Lassel's case, they said, was a strong case to govern the point; and the return of paratum habeo is in effect no more than that he had the body ready to bring into Court, when the Court should command him; and it is the common practice only to amerce the Sheriff till he does bring in the body: and therefore no Action lies against him; for it is not reasonable that he should be twice punished for one Offence, and that against the Court only. Scroggs delivered no Opinion: but Judgment was given, ut sup.

Cockram & Welby.

Action upon the Case against a Sheriff, for that he levied such a sum of money upon a Fieri facias at the Suit of the Plaintiff, and did not bring the money into Court at the day of the return of the Writ, Per quod deterioratus est, & dampnum habet, &c. The Defendant pleads the Statute of 21 Jac. of Limitations. To which the Plaintiff demurs. (5.) Executor. 2 Mod. Rep. 212. 21 Jac. 16. §. 3. N.

Serjeant Barrell. This Action is within the Statute. It ariseth ex quasi contractu: Hob. 206. Speak & Richard's case. It is not grounded on a Record, for then nullum tale Recordum would be a good plea, which it is not: it lies against the Executors of a Sheriff, which it would not do, if it arose ex maleficio.

Pemberton. This Action is not brought upon the Contract; if we had brought an Indebitatus Assumpsit, which perhaps would lie, then indeed we had grounded our selves upon the Contract, and there had been more colour to bring us within the Statute; but we have brought an Action upon the case for not having our money here at the day, Per quod, &c.

North.

North. An Indebitatus Assumpsit would lie in this case against the Sheriff or his Executor; and then the Statute would be pleadable. I have known it resolved, that the Statute of Limitations is not a good plea against an Attorney, that brings an Action for his Fees, because they depend upon a Record here, and are certain.

Next Trinity Term the matter being moved again, the Court gave Judgment for the Plaintiff, Nisi causa, &c. If the fieri facias had been returned, then the Action would have been grounded upon the Record, and it is the Sheriff's fault that the Writ is not returned: but however the Judgment in this Court is the foundation of the Action. Debt upon the Stat. of 2 Edw. 6. for not setting out Tythes, is not within the Stat. for oritur ex maleficio; so the ground of this Action is maleficio, and the Judgment here given. In both which respects it is not within the Statute of Limitations.

1 Cro. 540.
1 Sand. 38.
Stiles 214.
1 Cro. 513.
333.

Barrow & Parrot.

(6.)
Enfant.

Parrot had married one Judith Barrow an Heiress. Sir Herbert Parrot, his Father and an ignorant Carpenter, by virtue of a dedimus potestatem to them directed, took the conscience of a fine of the said Judith, being under age, and by Indenture the use was limited to Mr. Parrot and his wife for their two lives, the remainder to the Heirs of the Survivor; about two years after the wife died without issue; and Barrow as heir to her prayed the relief of the Court. Upon examination it appeared that Sir Herbert did examine the woman whether she were willing to levy the fine? and asked the husband and her, whether she were of age or not? both answered that she was. She afterwards, being privately examined touching her consent, answered as before, and that she had no constraint upon her by her husband, but she was not there questioned concerning her age. Sir Herbert Parrot was not examined in Court upon Oath, because he was accused; and North said, this Court could no more administer an Oath ex Officio, than the Spiritual Court could. North & Wyndham, There is a great trust reposed in the Commissioners,
and

and they are to inform themselves of the parties age ; and a voluntary ignorance will not excuse them. But Atkyns opposed his being fined : he cited Hungate's case, Mich. 12 Jac. Cam. Stell. 12 Cook, 122, 123. where a Fine by Dedimus was taken of an Infant, and because it was not apparent to the Commissioners, that the Infant was within age, they were in that Court acquitted. But North, Wyndham & Scroggs agreed, that the Son should be fined ; for that he could not possibly be presumed to be ignorant of his Wife's age. Atkyns contra. But they all agreed, that there was no way to set the Fine aside.

Term. Trin. 29 Car. II. in Communi Banco.

Searle & Long.

(7.).
Judgment.
2 Mod. Rep.
264.

QUare Impedit against two ; one of the Defendants appears ; the other casts an essoyn : wherefore he that appear'd had idem dies ; then he that was essoyn'd appears, and the other casts an essoyn. Afterward an Attachment issued for their not appearing at the day ; and so Process continued to the great distress : which being return'd, and no appearance, Judgment final was ordered to be entered according to the Statute of Marlebr. cap. 12.

3 Inst. 125.

It was moved to have this rule discharged, because the party was not summoned, neither upon the Attachment nor the great distress, and the Sureties returned upon the Process were John Doo & Richard Roo : an Affidavit was produced of Non-summmons, and that the Defendant had not put in any Sureties, nor knew any such person as John Doo & Richard Roo.

It was objected on the other side, that they had notice of the suit ; for they appeared to the Summons ; and it appeared that they were guilty of a voluntary delay, in that they forched in essoyn : and the Stat. of Marlebr. is peremptory ; wherefore they prayed Judgment.

Serjeant Maynard for the Defendants. If Judgment be entered against us, we have no remedy, but by a Writ of Deceit. Now in a Writ of Deceit the Summoners and veyors are to be examin'd in Court : and this is the Trial in that Action : but feigned persons cannot be examined. It is a great abuse in the Officers to return such feigned names. The first cause thereof was the ignorance of Sheriffs, who being to make a return, looked into some Book of Presidents for a form ; and finding the names of John Doo and Rich. Roo put down for examples, made their return accordingly, and took no care for true Summoners and true Manucaptors. For Non-appearance at the return of the great Distress in a plea of Quare Impedit, final

final Judgment is to be given, and our right bound for ever, which ought not to be suffered, unless after Process legally served, according to the intention of the Statute. In a case Mich. 23. of the present King, Judgment was entered in this Court in a plea of Quare impedit, upon non-appearance to the great Distress; but there the party was summoned, and true Summoners returned; upon non-appearance an Attachment issued, and real Summoners returned upon that: but upon the Distress it was returned, that the Defendants districki fuerunt per bona & catalla, & manucapi per Joh. Doo & Rich. Roo; and for that cause the Judgment was vacated. Cur. The design of the Statute of Marlebridge was to have Process duly executed, which if it were executed as the Law requires, the Tenant could not possibly but have notice of it. For, if he do not appear upon the Summons, an Attachment goes out; that is, a command to the Sheriff to seize his body, and make him give Sureties for his appearance: if yet he will not appear, then the great distress is awarded; that is, the Sheriff is commanded to seize the thing in question; if he come not in for all this, then Judgment final is to be given. Now the issue of this Process being so fatal, that the right of the party is concluded by it, we ought not to suffer this Process to be changed into a thing of course. It is true, the Defendant here had notice of the Suit; but he had not such notice as the Law does allow him, And for his fourching in effoy, the Law allows it him. Accordingly the Judgment was set aside.

Anonymus.

False Judgment out of a County Court; the Record was vitious throughout, and the Judgment reversed; and ordered that the Sutors should be amerced a Mark: but the Record was so imperfectly drawn up, that it did not appear before whom the Court was held: and the County Clark was fined five pounds for it. (8.)

Cessavit per biennium: the Defendant pleads Non-tenure. (9.)
He commenceth his plea, quod petenti reddere non debet, but concludes in abatement. Cessavit.

kk

Ser.

Serjeant Barrell. He cannot plead this plea, for he has im-
parted. Cur. Non-tenure is a plea in bar : the conclusion in-
deed is not good ; but he shall amend it.

Barrell. Non-tenure is a plea in abatement. The diffe-
rence is betwixt Non-tenure that goes to the tenure (as
when the Tenant denies that he holds of the Demandant, but
says that he holds of some other person, which is a plea in
bar) and Non-tenure that goes to the Tenancy of the Land :
as here he pleads that he is not Tenant of the Land : and that
goes in abatement only. The Defendant was ordered to
amend his plea.

Addison *versus* Sir John Otway.

(9.)
Supra 206.
pl. 37.
2 Mod. Rep.
233.

Allen 88.

TENANT in tail of Lands in the Parishes of Rippon &
Kirby-Marlestone in the Towns of A. B. & C. Tenant
in Tail makes a Deed of bargain and sale to J. S. to the in-
tent to make J. S. Tenant to the Præcipe, in order to the suf-
fering of a common Recovery of so many Acres in the Parishes
of Rippon & Kirby-Marlestone. Now in those Parishes there
are two Towns called Rippon & Kirby-Marlestone ; and the
Recovery is suffered of Lands in Rippon & Kirby-Marlestone
generally ; all this was found by special Verdict : And further,
that the intention of the parties was, that the Lands in que-
stion should pass by the said recovery, and that the Lands in que-
stion are in the Parishes of Rippon & Kirby-Marlestone, but
not within the Townships ; and that the bargainor had no
Lands at all within the said Townships. The question was, whe-
ther the Lands in question should pass by this Recovery, or not ?

Shaftoe : They will pass. The Law makes many
strained constructions to support common Recoveries, and
abates of the exactness that is required in adversary Suits.
2 Rolls 67. 5 Rep. Dormer's case. Eare & Snow, Plo. Com. Sir
Moyle Finche's case, 6 Rep. Cr. Jac. 643. Ferrers & Curson. in
Stork & Foxe's case : Cr. Jac. 120, 121. where two Miles Wal-
ton & Street were in the Parish of Street ; and a man having
Lands in both, levied a Fine of his Lands in Street, his
Lands in Walton would not pass : but there the Conuſor had
Lands in the Town of Street to satisfy the grant : but in
our

our case it is otherwise. He cited also Rolls Abridgm. Grants 54. Hutton 105, Baker & Johnson. The Deed of bargain and sale, and the Recovery, make up in our case but one assurance, and construction is to be made of both together : as in Cromwell's case 2 Report. The intention of the parties, Rules Fines and Recoveries, and the intention of the parties in our case appears in the Deed, and is found by the Verdict. Rolls Abridgm. 19. 2 part. Winch. 122. per Hob. Cro. Car. 308. Sir George Symond's case : betwixt which last case and ours all the difference is, that that case is of a Fine, and ours of a Common Recovery : betwixt which Conveyances, as to our purpose, there is no difference at all. He cited Jones & Wait's case, Trin. 27 Car. 2. in this Court, and a case 16 Reg. nunc, in B. R. when Hide was Chief Justice, betwixt Thynne & Thynne. Ante 206.

North. The Law has always stuck at new niceties, that have been started in cases of Fines and Common Recoveries, and has gotten over almost all of them. I have not yet seen a case that warrants the case at Bar in all points. Nor do I remember an Authority expressly against it : and it seems to be within the reason of many former resolutions. But we must be cautious how we make a further step.

Wyndham. I think the Lands in question will pass well enough : and that the Deed of bargain and sale, which leads the uses of the Recovery, does sufficiently explain the meaning of the words Rippon & Kirby Marlestone, in the recovery. I do not so much regard the Juries having found what the parties intention was, as I do the Deed it self, in which he expresses his own intention himself : and upon that I ground my Opinion. 8 Co. 155. a.

Atkins agreed with Wyndham. Indeed when a place is named in legal proceedings, we do prima facie intend it of a Ville, if nothing appears to the contrary ; stabitur præsumptio donec probetur in contrarium. In this case the Evidence of the thing it self is to the contrary. The reason why prima facie we intend it of a Ville, is because as to civil purposes the Kingdom is divided into Villes. We do not intend it of a Parish, because the division of the

Kingdom into Parishes is an Ecclesiastical distribution to Spiritual purposes. But the Law in many cases takes notice of Parishes in civil affairs, and Custom having by degrees introduced it, we may allow of it in a Recovery as well as in a Fine.

2 Co. 58. a.
Hob. 224.

Scroggs accordant. If an Infant levy a Fine, when he becomes of full age, he shall be bound by the Deed that leads the Uses of the Fine, as well as by the Fine it self, because the Law looks upon both as one assurance. So the Court was of Opinion that the Lands did pass.

It was then suggested, that Judgment ought not to be given notwithstanding; for that the Plaintiff was dead. But they said they would not stay Judgment for that, as this case was. For between the Lessor of the Plaintiff and the Defendant there was another cause depending, and tryed at the same Assizes, when this issue was tryed, and by agreement between the parties the Verdict in that cause was not drawn up, but agreed that it should ensue the determination of this Verdict, and the title to go accordingly. Now the submission to this Rule was an implicate agreement not to take advantage of such occurrences as the death of the Plaintiff in an Ejectione firmæ, whom we know to be no wise concerned in point of interest, and many times but an imaginary person. It was said also to have Judgment, that there lived in the County where the Lands in question are, a man of the same name with him that was made Plaintiff. This the Court said was sufficient, and that were there any of that name in rerum natura, they would intend that he was the Plaintiff.

Cur. We take notice judicially, that the Lessor of the Plaintiff is the person interested, and therefore we punish the Plaintiff, if he release the Action, or release the damages. Accordingly Judgment was given.

Anonymus.

Anonymus.

DEbt upon an Obligation was brought against the Heir (10.) of the Obligor; hanging which Action, an other Action Heir. was brought against the same Heir, upon another Obligation of his Ancestor. Judgment is given for the Plaintiffs in both Actions; but the Plaintiff in the second Action obtains Judgment first. And which should be first satisfied was the question,

Barrel. He shall be first satisfied, that brought the first Action. North. It is very clear, That he for whom the first Judgment was given, shall be first satisfied. For the Land is not bound, till Judgment be given. But if the Heir, after the first Action brought, had aliened the Land, which he had by descent, and the Plaintiff in the second Action, commenced after such alienation, had obtained Judgment, and afterward the Plaintiff in the first Action had Judgment likewise, in that case the Plaintiff in the first Action should be satisfied, and he in the second Action not at all.

What if the Sheriff return in such a case, that the Defendant has Lands by descent, which indeed are of his own purchase? North. If the Sheriffs return cannot be traversed, at least the party shall be relieved in an Ejectione firmæ.

Dominus Rex versus Thorneborough & Studly.

The King brought a Quare Impedit against the Bishop (11.) of and Thorneborough and Studly, and declares, That Queen Elizabeth was seised in fee of the Advowson of Redriff in the County of Surrey, and presented J. S. that the Queen died, and the Advowson descended to King James, who died seized, &c. and so brings down the Advowson by descent, to the King that now is. Thorneborough the Patron pleads a Plea in Bar, upon which the King demurs. Encumbent

demurs. Studly the Incumbent pleads, confessing Queen Elizabeths seisin in fee in right of her Crown, but says, that she in the second year of her Reign, granted the Advowson to one Bosbill, who granted to Ludwell, who granted to Danson, who granted to Hurlestone, who granted to Thorneborough, who presented the Defendant Studly, and traverseth absque hoc that Queen Elizabeth died seized,

The Defendant's Council produced the Letters Patents of secundo Reginae to Bosbill and his heirs.

The King's Council give in evidence a Presentation made by Queen Elizabeth by usurpation anno 34 Regni sui, of one Rider, by which Presentation the Advowson was vested again in the Crown. The Presentation was read in Court; where, in the Queen recited, that the Church was void, and that it appertained to her to present.

a Rol. 370.

North Chief Justice. Is not the Queen deceased in this Presentation; for she recites, that it belongs to her to present, which is not true? If the Queen had intended to make an usurpation, and her Clerk had been instituted, she had gained the Fee-simple; but here she recites, that she had right.

6 Co. 29. b.

Maynard. When the King recites a particular Title, and has no such Title, his Presentation is void: but not when his recital is general, as it is here. And this difference was agreed to in the King's Bench, in the Case of one Erasmus Dryden.

The Defendant's Council shewed a Judgment in a Quare Impedit against the same Rider, at the suit of one Wingate in Queen Elizabeths time: whereupon the Plaintiff had a writ to the Bishop, and Rider was ousted. Wingate claimed under the Letters Patents of the Second of the Queen, viz. by a Grant of one Adie to himself; to which Adie one Ludwell granted it, anno 33 Eliz.

Baldwin. It appears by the Record of this Judgment, that a writ to the Bishop was awarded: but no final Judgment is given, which ought to be after the three points of the writ enquired.

North. What is it that you call the final Judgment? there are two Judgments in a Quare Impedit: one that the Plaintiff shall have a writ to the Bishop, and that is the final Judgment, that goes to the right betwixt the parties. And the Judgment at the Common Law. There is another Judg.

Judgment to be given for Damages since the Stat. of West 2. cap. 5. after the points of the writ are enquired of. Which 5 Co. 59. a. Judgment is not to be given but at the instance of the party.

Pemberton. This Wingate that recovered, was a stranger, and had no title to have a Quare Impedit. Now I take this difference; where the King has a good Title, no recovery against his Clerk, shall affect the King's Title; he shall not be prejudiced by a Recovery, to which he is no party. If the King have a defeasible Title, as in our case by Usurpation, there if the rightful Patron recover against the King's Incumbent, the King's Title shall be bound, though he be not a party: for his Title having no other Foundation than a Presentation, when that is once avoided, the King's Title falls together with it. But though the King's Title be only by Usurpation, yet a Recovery against his Clerk by a Stranger, that has nothing to do with it, shall not prejudice the King: Covin may be betwixt them, and the King be triced. Now Wingate had no Right: for he claimed by Grant from one Adie, to whom Ludwell granted ann. 33 Eliz. But we can prove this Grant by Ludwell to have been void, for in the 29th of the Queen he had made a prior Grant to one Danfon, of which Grant we here produce the Inrolment. This Grant to Danfon was an effectual Grant, for anno 11 Jacobi a Presentation was made by J. R. & Th. Danfon, which proves that this Grant took effect, and the Defendant himself deduceth the Title of his own Patron under that Grant.

Barrel. Wingate is not to be accounted a Stranger; for he makes Title by the Letters Patents of 2 Eliz. so that he encounters the Queen with her own Grant: and his Title under that Grant was allowed by the Court, who gave Judgment accordingly. There was no faint Pleader in the Case, as appears by the Record, that has been read. And covin shall not be presumed, if it be not alledged. We deduce our Title under the Grant made to Danfon, 29 Eliz. in our plea, but that is only by way of inducement to our traverse.

Cur. By that Judgment temp. Regin. Eliz. the Queens Title was avoided. We must not presume that Wingate had a Title. Ex diuturnitate temporis omnia præsumuntur solemniter esse acta. That Quare Impedit was brought when the

the matter was fresh. Without doubt Danfon would have asserted his Title against Wingate, if he had had any. The Defendant did not do prudently in conveying a Title to his Patron under the Grant made to Danfon: but issue being taken upon the Queens dying seized, he shall not be concluded to give in Evidence any other Title to maintain the Issue. Upon which Evidence the Jury found for the Defendant, that Queen Elizabeth did not die seized.

North said, He was clearly of Opinion, That the King's Title by Usurpation should be avoided by a Recovery against his Clerk, though the Recoperer were a meer stranger.

The Company of Stationers against Seymour.

(12.)
Books.

The Company brought an Action of Debt against Seymour for printing Gadbury's Almanacks without their leave. Upon a special Verdict found, the question was, Whether the Letters Patents whereby the Company of Stationers had granted to them the sole printing of Almanacks, were good or not. The Jury found the Stat. of 13 & 14 Car. 2. concerning Printing. They found a Patent made by King James of the same Privilege to the Company, in which a former Patent of Queen Elizabeths was recited; and they found the Letters Patents of the King that now is. Then they found that the Defendant had printed an Almanack, which they found in his verbis & figuris: and that the said Almanack had all the essential parts of the Almanack, that is printed before the Book of Common prayer: but that it has some other additions, such as are usual in common Almanacks, &c.

Pemberton. The King may by Law grant the sole-printing of Almanacks. The Art of Printing is altogether of another consideration in the eye of the Law, than other Trades and Mysteries are; the Press is a late Invention. But the Exorbitancies and Licentiousness thereof has ever since it was first found out been under the care and restraint of the Magistrate. For great Mischiefs and Disorder would ensue to

to the Common-wealth, if it were under no regulation : and it has therefore always been thought fit to be under the Inspection and controul of the Government. And the Stat. 14 Car. 2. recites that it is a matter of publick Care. In England it has from time to time, been under the King's own Regulation, so that no Book could lawfully be printed without an Imprimatur granted by some that derive authority from him to Licence Books. But the question here is not Whether the King may by Law grant the sole-printing of all Books ; but of any, and of what sort of Books ? the sole-Printing of Law-Books is not now in Question ; that seemed to be a point of some difficulty, because of the large extent of such a Patent, and the uncertainty of determining what should be accounted a Law-Book, and what not. And yet such a Patent has been allowed to be good by a Judgment in the House of Peers. When Sir Orlando Bridgeman was Chief Justice in this Court, there was a Question raised concerning the validity of a Grant of the sole-printing of any particular Book, with a Prohibition to all others to print the same, how far it should stand good against them that claim a Property in the Copy paramount to the King's Grant ? and Opinions were divided upon the Point. But the Defendant in our Case makes no Title to the Copy ; only he pretends a nullity in our Patent. The Book which this Defendant has printed has no certain Author, and then, according to the Rule of our Law, the King has the property ; and by consequence may grant his Property to the Company.

Cur. There is no difference in any material part betwixt this Almanack and that that is put in the Rubrick of the Common-Prayer. Now the Almanack that is before the Common-Prayer, proceeds from a publick Constitution : it was first settled by the Nicene Council, is established by the Canons of the Church, and is under the Government of the Archbishop of Canterbury. So that Almanacks may be accounted Prerogative Copies. Those particular Almanacks that are made yearly, are but applications of the general Rules there laid down for the moveable Feasts for ever, to every particular year. And without doubt, this may be granted by the King. This is a stronger Case than that of Law-Books which has been mentioned. The Lords in the Resolution of that Case relied upon this, That

L I

Printing

Printing was a new Invention, and therefore every man could not by the Common Law have a liberty of Printing Law-Books. And since Printing has been invented, and is become a common Trade, so much of it as has been kept inclosed, never was made common: but matters of State, and things that concern the Government, were never left to any Man's liberty to Print that would. And particularly the sole Printing of Law-Books has been formerly granted in other Reigns. Though Printing be a new Invention, yet the use and benefit of it is only for Men to publish their Works with more ease than they could before: Men had some other way to publish their Thoughts before Printing came in; And forasmuch as Printing has always been under the Care of the Government since it was first set on foot, we may well presume that the former way was so too. Queen Elizabeth, King James, and King Charles the first, granted such Patents as these; and the Law has a great respect to common Usage. We ought to be guided in our Opinions by the Judgment of the House of Peers; which is express in the Point: the ultimate resort of Law and Justice being to them. There is no particular Author of an Almanack: and then by the Rule of our Law, the King has the Property in the Copy. Those additions of Prognostications and other things that are common in Almanacks, do not alter the Case; no more than if a Man should claim a property in another man's Copy, by reason of some inconsiderable additions of his own. Accordingly Judgment was given for the Plaintiffs, *nisi causa*, &c.

Anonymus.

(13.)
Tythes.
2 Mod. Rep.
254.

Action of Trespass for taking away four Loads of Wheat, four Loads of Rye, four Loads of Barly, four Loads of Beans, and four Loads of Pease: the Defendant as to part pleaded Not Guilty. And as to the other part justified; for that the Plaintiff is Rector of the Rectory Impropriate of Bradwardyne in the County of Hereford, and so bound to repair the Chancel; and that the Chancel being out of Repair, the Bishop of Hereford, after monition to the

the Plaintiff to repair the same, had granted a Sequestration of the Tythes, &c. of the Rectory, and that the Defendants, being Church-wardens, had taken them into their hands, and so justified by vertue of the Sequestration. To which the Plaintiff demurred.

Serjeant Barrel. I do not deny but that the Rector of a Rectory Improprate may perhaps be bound of common right to repair the Chancel. But since the Stat. of 31 H. 8. & 32 H. 8. c. 7. has converted the Tythes of such Rectories into a Lay-Fee, it has consequently exempted them from the Jurisdiction of the Ordinary. A doubt was conceived upon the Statute of 31 H. 8. whereby Pensions, Proxies, and Syddals are saved, what Remedy lay for the recovery of them; and it was therefore provided by the Stat. 32 H. 8. that the Church should be sequestred. The Possessions of Ecclesiastical Persons were subjected to the Jurisdiction of the Ordinary, and might be sequestred in many cases, by Process out of the Bishops Courts: but when-ever the Possessions of Lay-men were charged with any Ecclesiastical payment or Spiritual charge, the Ordinary could not take the Land into his hands, nor meddle with the Possession thereof in any sort; but the constant usage was to compel the persons by Ecclesiastical Censures. Anno 1570. there was application made to the Queen to provide a Remedy for the Reparation of the Chancels of such Churches, whereof the Parsonages were Impropriated. Moreover, he said, a Sequestration does not bind the Interest, nor put the Rector out of possession, the not submitting to it is only matter of contempt; and it can no more be pleaded in Bar to an Action of Trespas, than a Sequestration out of Chancery.

Arkyns. I hope not to see it drawn in Question, Whether a Sequestration out of Chancery may be pleaded in Bar to an Action of Trespas at the Common Law, or no. But if it were pleaded, I think we need not scruple to allow such a Plea, by reason the Court of Chancery at Westminster prescribes to grant such a Process. Which is a Court of such Antiquity, that we ought to take notice of their Customs.

Serjeant Baldwin contra. He cited, F. N. B. f. 50. M. Reg. Orig 44. b. ibid. 48. a. the Stat. of Circumspecte agatis, 31 Edw. 1 Joh. Diathan in his Commentary upon the Legantine Constitutions of Othobone, tit. ne Prælati fructus Ecclesiarum

vacantium perciperent. Linw. 136. de ædificand. Ecclesiis. The Reparation of the Chancel is onus reale, impositum rebus, non personis. 5 Co. Cawdrie's Case 9. he cited the Stat. of 25 H. 8. cap. 19. Sir John Davie's Reports 70. Vaughan 327. Reg. Jud. 22. 26. 13 H. 4. 17. 21 H. 6. 16. b. 28 H. 8. cap. 9.

Co. Lit. 159. b.

It is objected, that these Cythes are become a Lay-fee. To which I answer, That by the Statute of 32 H. 8. there is a remedy given for them in the Spiritual Court. It is enacted indeed, That Fines and Recoveries may be suffered of them, as of Lands and Tenements, but they are not made Lay-fees to other purposes. No Statute exempts them from the Jurisdiction of the Ordinary, nor discharges the onus reale. The saving in the Stat. of 31 H. 8. preserves the power of Sequestration, as well as other particulars there instanced. For all Rights of any person or persons, their Heirs and Successors is saved, &c. the saving is large. The Parishioners have a right in the Chancel, and to have it kept in repair; for the Communion-Table is to stand there: though they have not Jus sepulturæ there. The practice is with us. And this is the first instance of disobedience to such a Sequestration. Besides there are many Impropriations in the Hands of Deans and Chapters, and Bodies Politick, which cannot be excommunicated: what process will you grant against them but Sequestration? I do not mean Appropriations; to wit, such Rectories as were appropriated to them before the dissolution of Monasteries, and have continued so to this day: for there is no question but the Ordinary may sequester them, but I mean such Impropriations as they have purchased of the King and his Patentees since the dissolution.

North. The Bishop is in the nature of an Ecclesiastical Sheriff. If an Action of Debt were brought against a Clerk, and the Sheriff had returned upon a Fieri facias that the Defendant was Clericus beneficiatus non habens laicum feodum; there issued a Fieri facias to the Bishop, upon which he used to sequester (as they call it) the Ecclesiastical possessions of the Defendant, but that is not properly a Sequestration: for the Ordinary must not return Sequestrari feci: he must return Fieri feci, or nulla bona, in like manner as a Sheriff of a County must do: this I have known in experience, that a Bishop has been ordered in such a Case to amend his

his return. The reason of this Process was, because the possessions of Ecclesiastical persons were so distinct from Temporal possessions, that they could not be subject to the ordinary process of the Temporal Law, no more than possessions of Lay Men could be subject to their Jurisdiction. And therefore Rectories Improprate being now incorporated into the Common Law, and converted into Lay Fees, it should seem to me, that they are thereby exempted from the Jurisdiction of the Ordinary. And this I take to be within the reason of Jeffrie's Case in 5 Co. where temporal persons that are liable to contribute towards the repairs of the Church, out of their temporal possessions, are said to be compellable thereunto by Ecclesiastical Censures. It has been said, that the Parishioners have a right in the Chancel; but I question that: It is called Cancellum, a Cancellis: because the Parishioners are barred from thence. It is the right of the Parson. Windham thought, that by the saving in the Statute of 31 H. 8. the Jurisdiction of the Ordinary was preserved. Atkyns. The Parson was chargable with the reparation of the Chancel, in respect of the profits which he received. They were the proper Debtors. Now I think it may be held that the Impropration affects only the Surplusage of the Profits over and above all Charges and Duties issuing out of the Parsonage, and wherewith it was originally charged. The Reparation of the Chancel is a right arising from the first Donation: which shall not be taken away but by express words. Scroggs accordant.

North. The Defendants Plea is naught; for the cause of their Justification is, that what they did was in executing a Sequestration, whereby they were authorized to take into their hands the profits of the Rectory for the reparation of the Chancel. Now they ought to averr, that they did not take into their hands more than was sufficient for the reparation thereof.

North. If the Law come to be taken as my Brothers are of Opinion, it will make a great step to the giving Ordinaries power to encrease Vicarages. For the Parishioners have a right to a Maintenance for one to preach to them. Adjournatur.

Edwards & Weeks.

(14.)
 Accord.
 Supra 206.
 pl. 36.
 2 Mod. Rep.
 259.
 2 Leon. 214.
 Ant. 206.
 2 Rol. 408.
 2 Cro. 620.

Action upon the Case. The Plaintiff declares, that the Defendant in consideration that the Plaintiff would deliver unto him such a Horse, promised to deliver to the Plaintiff in lieu thereof another Horse, or five pounds upon request: and avers, that the Plaintiff had delivered to the Defendant the said Horse, and had requested him, &c.

The Defendant pleads that the Plaintiff, before the Action brought, discharged him of that promise, but says not how: To which the Plaintiff demurred.

Strode. If he had pleaded a discharge before the request made, the plea had been good, without shewing how he discharged him, but after the request once made, a verbal discharge is not sufficient. Cro. Car. Langden & Stokes 384. & 22 Ed. 4. 40. b. Cur' acc'. Et judicium pro querente, Nisi causa, &c.

Barker & Keate.

(15.)
 Affurances.
 Use.

Ejectione firmæ of Land in Castle-acre in Com' Norff. The Defendant pleaded not Guilty; and the issue was found as to part: and for the residue there was a special Verdict, viz. That Edm. Hudson was seized to him and the heirs males of his body, the remainder to Willam Hudson his Brother, and the heirs males of his body. That Edm. Hudson by Indenture betwixt himself and Thom. Peeps demised to Thom. Peeps from the Feast of St. Michael then last past for six months, rendering a Pepper-corn rent: and that afterwards by another Indenture between himself on the one part, and Thom. Peeps & Edw. Bromley on the other part, reciting the said Lease, he bargained and sold the Reversion to Tho. Peeps his heirs and assigns, to the intent to make him Tenant to the Præcipe in order to the suffering of a Common Recovery, in which Edm. Bromley was to be the Recoveror, and himself the said Edw. Hudson the Toucher, and that this Recovery was to be to the use of Edm. Hudson and his Heirs, &c. and the Jury made a special conclusion, viz. That if the Court should adjudge that in

in this Recovery there were a good Tenant to the Præcipe, then they found for the Plaintiff; if otherwise, for the Defendant.

Serjeant Waller argued that there was no good Tenant to the Præcipe; for that Tho. Peeps never was in possession by virtue of the Lease for six Months. No Entry is found, nor no Consideration to raise an Use. All the consideration mentioned is the reservation of a Pepper-corn, which is not sufficient: for it is to be paid out of the profits of the Land. He compared it to Colyer's Case, 6 Co. where a sum in gross appointed to be paid by the Deviser, gave him an Estate in Fee-simple: but a sum to be paid out of the Profits of the Land, not. He cited the Lord Pager's Case, Moor 343. Dyer 10. Hob. 197. ^{1 Co. 154.} placito 31. Besides the consideration in our Case is a thing of no value: being but a single Pepper-Corn. If an Infant make a Lease for years, rendering Rent, the Lease is but voidable; but if an Infant make a Lease for years, rendering a Rose, or a Pepper-corn, or any such like trifle, the Lease is void. He cited Fitzherb. tit. Entry congeable 26.

North. When a Tenant for Life or Years assigns his Estate, there needs no consideration, in such case the tenure and attendance, and the being subject to the ancient forfeiture and the payment of Rent, if there were any, is sufficient to vest the use in the Assignee: but otherwise in case of a Fee-simple. When a Man is seized in Fee, and makes a Lease for years, unless he give possession, and that the Lessee enter, he must raise an Use. But in our case the reservation seems not sufficient to raise an Use, for an Use must be raised, and the Land united to it, before a Rent can result out of it. ^{2 Rol. 781. pl. 7.}

Wyndham. It being in the case of a Common Recovery, we must support it, if it be possible. In Sutton's Hospital's Case, 10 Co. 34. a. it is said that the reservation of 12 d. Rent was a sufficient consideration to vest an Use in the Hospital: and a Rent of 12 d. is as inconsiderable a matter in consideration of a great Estate, as a Pepper-Corn in our Case. The Case in Dyer, that has been cited, is made a Quære in the Book. I think the Reservation of a Rent would have changed an Use at the Common-Law, and will raise an Use at this day; If a Feoffee to an Use had made a Feoffment in Fee rendering Rent, the Feoffment (I conceive) would have been to the use of the second Feoffee, and the first Use destroyed. The other two Justices delivered no Opinion.

At

At another day, the cause being moved again, North said he had looked upon the President quoted out of Sutton's Hospital's Case; and that there the reservation of a Rent was mentioned in the Deed, as a consideration to raise an Use, which, he said, would perchance make a difference betwixt that Case and this. But the Court would advise further.

By the Court Judge of the will &c.

Bassett & Bassett.

(16.) **A**N Action of Debt upon an Obligation of 600 l. penalty;
Condition. The Condition was, That if the above-bounded John Bassett, his Heirs or Assigns shall within six Months after the death of Mary Bassett his Mother, settle upon and assure unto Hopton Bassett as the Council of the said Hopton Bassett, learned in the Law shall advise, at the Costs and Charges of the said Hopton Bassett, an Annuity or Rent-charge of twenty pounds per annum, payable half yearly by equal portions, from the death of the said Mary, during Hopton Bassett's Life, if he the said Hopton Bassett require the same at the dwelling House of the said John Bassett, or if he shall not grant the same, if then the said John Bassett shall pay unto Hopton Bassett, within the time aforementioned, 300 l. then the Obligation to be void. The Defendant pleaded, that the Plaintiff (to wit, the said Hopton Bassett) had not tendered any Grant of an Annuity, within the time of six Months after the death of his Mother, according to, &c. the Plaintiff replied, and the Defendant rejoined; But the Council of both sides and the Court agreed that the whole question arose upon the plea in bar.

Strode for the Defendant. The Plaintiff ought to have tendered us a Grant of Annuity, to be sealed within six months &c. and having neglected that, he has dispensed with the whole Condition. For 1. This is not a disjunctive Condition, but the payment of 300 l. is as a penalty imposed upon him, if he refuse to make such a Grant. And if he shall not, &c. instead of the word not, put the words refuse to, &c. and the case will be out of doubt. Besides the Annuity to be granted, is but 20 l. per Annum for a Life, and 300 l. in Money is more

more then the value of it, so that it cannot be intended a Sum to be paid in lieu of recompence of it; but must be taken for a penalty.

But suppose it to be a disjunctive Condition, then we ought to have an election whether we would do; but as this case is, the Plaintiff by his negligence has deprived us of our Election. For Authorities he cited Gerningham & Ewer's Case, Cro. Eliz. 396. & 539. 4 H. 7. f. 4. 5. Co. 21. b. Laughter's Case, and Warner & Whyte's Case, resolved the day before in the Kings Bench. There is a Rule laid down in Morecomb's Case, in Moor's Rep. 645. which makes against me, but the Resolution of that Case is Law; and there needed no such rule. That Case goes upon the reason of Lamb's Case, 5 Co. when a Man is obliged to pay such a Sum as J. S. shall assess, J. S. being a meer Stranger, the Obligor takes upon him, that J. S. shall assess a Sum in certain, and he must procure him to do it, or he forfeits his Obligation. But in our Case nothing is to be done but by the Obligee himself.

Pemberton cont. He argued that the Obligor's Election is not taken away; for though no Deed were tendered him, he might have got one made, and the tender of that would have discharged the condition of his Bond. Indeed this will put him to charge, but he may have an Action of Debt for what he lays out. He cited the Cases cited by Walmsley in Moor 645. betwixt Mills & Wood. 41 El. & Gowers Case, 38 & 39 El. & c.

North. The Case of Warner & White, adjudged yesterday in the Court of Kings Bench, is according to Law; the condition there was, that J. S. should pay such a Sum upon the 25th of December, or should appear in Hillary Term after, in the Court of Kings Bench. J. S. died after the 23th of Dec' and before Hill. Term; and had paid nothing upon the 25th of December. In that Case the Condition was not broken by the non-payment, and the other part is become impossible by the act of God. But I think, that if the first part of a Condition be rendered impossible by the act of God, that the Obligor is bound to perform the other part: but in the Case at the bar the Obligor's Election is taken away by the act of the Obligee himself. And I see no difference betwixt this Case and that of Gerningham & Ewer, in Cro. El. if the Condition of an Obligation be single, to make such assurance as shall be advised by the Council of the Obligee; there concilium non dedit ad-visamentum, is a good plea; and the Obligor is not bound to

make

make

make an assurance of his own head; no more shall he be bound to do it when the Condition is in the disjunctive, to save his Bond. In both Cases the Condition refers to the manner of the assurance; and it must be made in such manner as the words of the condition import. So he said he was of Opinion against the Plaintiff.

Wyndham. Where the Condition of an Obligation is in the disjunctive, the Obligor must have his Election. But in this case there is no such thing as a disjunctive, till such time as there be a Request made to Seal a Deed of Annuity; and then the Obligor will have an Election, either to execute the assurance, or to pay the 300 l. but no such request being made, it should seem that the Obligor must pay the 300 l. at his peril.

Atkins agreed with the Chief Justice, and so did Scroggs; wherefore Judgment was ordered to be entered against the Plaintiff. *Nisi causa, &c.* within a week.

(17.)

Quare Impedit, The Plaintiff declared upon a grant of the Advowson to his Ancestor; and in his Declaration says, *hic in Cur' prolat'*, but indeed had not the Deed to shew. Serjeant Baldwin brought an Affidavit into Court, that the Defendant had gotten the Deed into his hands, and prayed that the Plaintiff may take advantage of a Copy thereof, which appear'd in an Inquisition found temp. Edw. 6.

Cur'. When an Action of Debt is brought upon a Bond to perform Covenants in a Deed, and the Defendant cannot plead Covenants perform'd, without the Deed, because the Plaintiff has the original Deed, and perhaps the Defendant took not a Counterpart of it; we use to grant Imparlances till the Plaintiff bring in the Deed. And upon Evidence, if it be proved that the other party had the Deed, we admit Copies to be given in Evidence. But here the Law requires that the Deed be produced; you have your remedy for the Deed at Law. We cannot alter the Law, nor ought to grant an Imparlance.

r Sand. 9.

Stead & Perryer.

Ejectione firmæ. A Man has a Son called Robert. Robert has likewise a Son called Robert. The Grandfather devise^(19.)th the Land in Question to his Son Robert, and his ^{2 Mod. Rep. 313.} heirs. Robert the devisee dies in the devisors life-time. Afterwards the devisor makes a new publication of the same Will; and declares it to be his intention that Robert the Grand-child should take the Land in question per eandem voluntatem instead of his Father, and dyed. And all this was found by special Verdict upon a Tryal betwixt Robert the Grand-child, and a Daughter of the Elder Brother of Robert the first Devisee.

Pemberton. The Land does not pass by this Will; the devise to Robert became void by his death, and cannot be made good by a republication. A publication cannot alter the words of a Will, so as to put a new sense upon them. Land must pass by Will in Writing. Robert the Grand-son is not within this Will in Writing. The Grandfather's intention is not considerable in the Case.

Skipwith contra. I agree the Case between Brett & Ryden in the Commentaries to be Law: but there are two great diversities between this Case and that. 1. There was no new publication. 2. In this Case Robert the Father, and Robert the Son are cognominous. He cited Dyer 142, 143. Trevilian's Case. Fuller & Fuller. Cro. El. 422. & Moor 353. Cro. Eliz. 493.

North & Atkins. Without question Robert the Grand-child shall take by this Will. If he never had had a Son called Robert, or if Robert the Son had been dead at the time of making the Will, the Grand-child would then without dispute have taken by these words. Now a new publication is equivalent to a new Writing. The Grand-child is not directly within the words of the Will; but they are applicable to him. He is a Son, though he be not begotten by the Body of the Devisee himself. He is a Son with a distinction. Our Saviour is called the Son of David, though there were 28 Generations betwixt David and him. And a Republication may impose another sense upon words, different from what they had, when they were first written; as if a Man devise all his
 M m 2 Lands

3 Cro. 493.

5 Co. 68. b.

Lands in Dale, and have but two Acres in Dale; the words now extend to no more than those two Acres; and if he purchase more and dye without any new publication, the new purchased Lands will not pass. But if there were a new publication after the purchase, they would then pass well enough. If a Man has issue two Sons called Thomas; and he makes a devise to his Son Thomas, this may be ascertained by an averment. Now suppose that Thomas the devisee dye living the Father, and afterward the Father publisheth his Will anew, and says that he did intend that his Son Thomas now dead should have had his Land; but now his Will and intent is, that Thomas his younger Son now living shall take his Land by the same Will. In this case to be sure the cond Son Thomas shall take by the devise. Here the import of the words is clearly altered by the republication.

Atkyns. The words of this Will would not of themselves be sufficient to carry the Land to the Grandchild, nor would the intention of the Devisor do it without them; but both together do the business. Quæ non profunt singula, juncta juvant.

Wyndham & Scroggs differed in Opinion, and the cause was adjourned to be argued the next Term.

(20.)
Poor:

North. A Man admitted in forma pauperis is not to have a new Trial granted him: for he has had the benefit of the King's Justice once, and must acquiesce in it. We do not suffer them to remove Causes out of the Inferior Courts. They must satisfy themselves with the Jurisdiction within which their Action properly lieth.

Farrington & Lee.

(21.)
Account.
2 Mod. Rep.
311.

A Sumpsit. The Plaintiff declares upon two indebitatus Assumpsits, and a third Assumpsit upon an infimul computasset. The Defendant pleaded non assumpsit infra sex annos: the Plaintiff replied, that himself is a Merchant, and the Defendant his Factor, and recites a Clause in the Statute, in which Actions of Account between Merchants and Merchants, and Merchants and their Factors, concerning their

their Trade and Merchandize, are excepted ; and avers that that this money became due to the Plaintiff upon an Account betwixt him and the Defendant concerning Merchandise, &c. the Defendant makes an impertinent rejoinder, to which the Plaintiff demurs.

Nudigate pro Querente. This Statute is in the nature of a penal Law ; because it restrains the liberty which the Plaintiff has by the Common Law, to bring his Action when he will : and must therefore be construed beneficially for the Plaintiff: Pl. 54. Cro. Car. 294. Finch & Lamb's Case : to this purpose. Also this Exception of Accounts between Merchants and their Factors, must be liberally expounded for their benefit ; because the Law-makers in making such an Exception, had an Eye to the encouragement of Trade and Commerce. The words of the Exception are (other than such Accounts as concern the Trade Merchandise, &c.) Now this Action of ours is not indeed an Action of Account ; but it is an Action grounded upon an Account. ^{2 Sand. 125.} And the Plaintiff being at liberty to bring either the one or the other upon the same cause of Action, and one of the Actions being excepted expressly out of the Limitation of the Statute, the other by Equity is excepted also. He cited Hill. 17 Car. 1. in Marsh's Reports 151. And Jones 401. Sandy's & Blodwell, Mich. 13 Car. 1. and prayed Judgment for the Plaintiff.

Serjeant Baldwin contra. He said it did not appear in the Declaration, that this Action was betwixt a Merchant and his Factors ; so that then his Plea in Bar is prima facie good. And when he comes and sets it forth in his Replication he is too late in it : and the Replication is not pursuant to his Declaration.

But all the Court was against him in this. Then he said the Statute excepted Actions of Account only ; and not Actions upon an indeb. Assump.

Cur. Whereas it has been said by Serjeant Nudigate, that the Plaintiff here has an Election to bring an Action of account, or an Indebitat. Assumpsit, that is false : for till the Account be stated betwixt them, an Action of Account lies, and not an Action upon the Case. When the Account is once stated, then an Action upon the Case
lies ;

lies, and not an Action of Account. Et per North. If upon an Indebitat. Assumpsit matters are offered in Evidence, that lie in Account, I do not allow them to be given in Evidence.

2 Sand. 127.
Ante 71.

Torhil 64.

March 105.

North, Wyndham & Scroggs. The Exception of the Statute goes only to Actions of Account and not to other Actions. And we take a diversity betwixt an account current and an account stated. After the account stated, the certainty of the Debt appears, and all the intricacy of account is out of doors: and the Action must be brought within six years after the account stated. But by North, If after an account stated, upon the Ballance of it a Sum appear due to either of the parties, which Sum is not paid, but is afterward thrown into a new account between the same parties; it is now slippt out of the Statute again.

Scroggs. The Statute makes a difference betwixt Actions upon Account and Actions upon the Case. The words would else have been, All Actions of Account, and upon the Case, other than such Actions as concern the Trade of Merchandize; but 'tis otherwise penned: other than such Accounts as concern, &c. and as this Case is, there is no account betwixt the parties; the account is determined, and the Plaintiff put to his Action upon an infimul computasser, which is not within the benefit of the Exception.

Atkyns. I think the makers of this Statute had a greater regard to the persons of Merchants, than the Causes of Action between them; and the reason was, because they are often out of the Realm, and cannot always prosecute their Actions in due time. The Statute makes no difference betwixt an account current and an account stated. I think also that no other sort of Tradersmen but Merchants are within the benefit of this Exception: and that it does not extend to Shop-keepers, they not being within the same mischief. Adjurantur.

Horn *versus* Chandler.

Covenant upon an Indenture of an Apprentice, where- (22.)
in the Defendant bound himself to serve the Plaintiff
for seven years. The Plaintiff sets forth the Custom of
London, That any person above 14, and under 21, unmarried
may bind himself Apprentice, &c. according to the Custom, and
that the Master thereupon shall have tale remedium against
him, as if he were 21, and alledges, that the Defendant did
go away from his Service, per quod he lost his Service for
the said term, which term is not yet expired. The Defen-
dant pleads a frivolous Plea. To which the Plaintiff de-
murs. Offley, Though such a Covenant shall not bind an
Infant, neither by Common Law, nor 5 Eliz. 1 Cro. 179.
yet by this Custom it shall, in Pasch. 21 Jac. B. R. Cole ver-
sus Holme, there was an Action against an Apprentice, the
Defendant pleaded Nonage; the Plaintiff replied the Cu-
stom of London, and that the Indenture of Apprentiship was
inrolled, as it ought to be, &c. and this was certified by the
Recorder Serjeant Finch, to be the Custom: and thereupon
Judgment was against the Defendant. It is a Manu-
script.

Jones. The Custom ought to have been alledged, that he
should have an Action of Covenant against him, which is not
done here; and Customs shall be taken strictly, not by simpli-
cation. Moreover the Plaintiff declares for a loss not yet
sustained, the term not being ended.

Cur. The Custom is sufficiently alledged to give and make
good an Action of Covenant Tale remedium implies it.
Those words are applicable to all things relating to this
matter, viz. That the Master may correct him, may go to a
Justice of Peace. And also may have an Action of Covenant
against him, as against a Man of full Age. And though by
Common Law or the Statute, his Covenant shall not bind
him, yet by the Custom it shall. But Twissden desired to see
Offley's Report. As to the declaring for the loss of the term,
part whereof is unexpired, though it has been adjudged to be
naught after a Verdict; yet in this Case, which is upon
demurrer, it may be helped; for the Plaintiff may take da-
mages

V. Hutt. 63. 4.
Winch 63. 4.
2 Sand. 169.

gages for the departure only, not the loss of Service during the term, and then it will be well enough. Judgment nisi, &c.

Jones *versus* Powel.

(23.) **W**ords spoken of an Attorney, Thou canst not read a Declaration, per quod, &c. Cur. The words are actionable, though there had been no special damages; for they speak him to be ignorant in his Profession, and we shall not intend that he had a Distemper in his Eyes, &c. Judic. pro querente.

Anonymus.

(24.)
2 Sand. 181.

The Defendant, in an Action of false Imprisonment, justified the taking and imprisoning the Plaintiff, by virtue of an Order of Chancery, that he should be committed to the Fleet; and the Plea judged naught, because an Order is not sufficient. It ought to have been an Attachment, he should have pleaded, Quoddam breve de attachamento, &c.

Osborne *versus* Walleeden.

(25.)
Keb. 712.
pl. 25.
2 Sand. 197.

Replevin. The Defendant avows in right of his Wife, for a Rent-charge devised to her for Life, by her former Husband. But in the Will there was this Clause, viz. If she shall marry, &c. he (the Executor) shall pay her 100 l. and the Rent shall cease, and return to the Executor. She doth marry, and the Executor does not pay the 100 l. The Question was, Whether the rent should cease before the 100 l. be paid.

Jones

Jones for the Plaintiff : the rent ceaseth immediately upon her Marriage, and she shall have remedy for the 100 l. in the Spiritual Court. If the words had been He shall pay her 100 l. and from that time the rent shall cease, It had been otherwise ; if she had died presently after the marriage, her Executor should have had the 100 l.

Brewer and Sanders for the Defendant, she hath not a present interest in the 100 l. In this very Case, the Common Pleas delivered their Opinion, That this 100 l. ought to be paid before the rent should cease. But for imperfection in the pleading, we could not have Judgment there.

Roll. She has no present interest in the 100 l. nor can her Executors have any, and the rent shall not cease till the payment of it. For first, It is devised to her for life, not during her Widowhood. Secondly, The rent issues out of the Inheritance, and by the construction of the Will it shall go to the Executor, for by cease in the Will is meant cease as to the Wife ; and the Executor is in nature of Purchaser, and ought to pay the money before he has the rent, and he ought to pay it out of his own Estate, if he will have the rent. For otherwise, if it be looked upon as a Legacy, if he have no Assets, she shall be immediately stripped of her rent, and have nothing.

Twisden. I think the Devisors meaning was to give her a present interest in the 100 l. and if so, the rent must cease presently upon the marriage. But since it is to be issuing out of the Inheritance, it is doubtful. And since my Brothers are both of Opinion for the Adowant, let him have Judgment.

Then it was Objected, That the Adowry was ill ; For it ought to have been in the Wifes name as well as the Husbands, and alledged, that Roll. 1 part 318. N. num. 2. makes a Quære, and seems to be of opinion that Wife versus Bellent (which is to the contrary) is not Law. V. 2 Cro. 442. 3.

Twisd. That was his Opinion, it may be, when he was a Student. You have in that Work of his a common place, which you stand too much upon. I value him where he reports Judgments and Resolutions. But otherwise it is nothing but a Collection of Year-Books, and little things noted when he made his Common Place Books. His private opinion must not warrant or controul us here. It has been adjudged, That the Husband alone may adow in right of his Wife.

R n

Delaval

Delaval *versus* Maschall.(26.)
2 Keb. 714.

DEbt upon a Bond; the Condition whereof was, That if J. S. and J. D. Arbitrators did make an Award on, or before the 19. of February; and if the Defendant should perform it, then the Obligation should be void; and then follow these words, And if they do not make an Award before the 19. of February, then I empower them to choose an Umpire, and by these presents bind my self to perform his Award. The Defendant pleads, That they did not make an Award. The Plaintiff replies, and sets forth an Award made upon the said 19. of February, by an Umpire chosen by the Arbitrators, and alledges a breach thereof. The Defendant demurs.

Ant. 15.

Sanders for the Defendant. Here is no breach of the Condition of the Bond. For that, which relates to the performing the Umpire's Award, it following those words, Then the Obligation shall be void, is no part of the Condition; and if any Action is to be brought upon that part, it ought to be Covenant. 2. The Award made by the Umpire is void, because made 19. of February, which was within the time limited to the Arbitrators, for their power, and the Umpire could not make an award within that time, because their power was not then determined, as was lately adjudged in Copping *versus* Horner.

Sid. 314.

Jones for the Plaintiff. The Condition is good as to this part, It is all but one Condition. A man may make several Defeasances or Conditions to defeat the same Obligation, Brook. Condition 66. There is a continuance of this Condition, It is said, I bind my self by these presents, which refers to the Lien before in the Obligation.

2 Sand. 130,
131.
Ant. 15.

I agreed with Copping *versus* Horner and Bernard *versus* King, That where an Umpire is at first certainly named and appointed, he cannot exercise his authority within the time appointed to the Arbitrators, because the same authority cannot be given to, and continue both in the Arbitrators and Umpire at the same time. But when the Umpire is named and chosen by the Arbitrators, as in our Case, he may make his award within the time allowed to the Arbitrators; because

cause there the Arbitrators by their own action, viz. the election of the Empire, determine their authority; And the authority vests and remains in the Empire only, and so it was admitted in *Bernard versus King*.

Twisden, assentibus Rainsford & Morton. This is a good part of the Condition. There was a Condition, That if the Obligor should; &c. then the Bond should be void; and further, that the Obligor should release: And it was adjudged here, That the last was a part of the Condition. I was at the Bar when the Case betwixt Barnard and King was spoken to, and I know Roll did hold and deliver then, That if it had been alledged, that the Arbitrators had wholly denied and deserted their power, it had let in the Empire, so as that he might account within the time allowed to the Arbitrators, and he stood upon this then, that it was implicitly alledged, viz. postquam denegassent, &c. But this was a hard Opinion of his, and he himself reports his own judgment otherwise, 1 Ro. 262. It may be he altered his Opinion; we incline that the award in the Case at the Bar is naught. For the authority of the Arbitrators was not determined till after the 19th of February. For Justice Croke goes so far, 1 Cro. 263. as to agree, That Arbitrators may nominate an Empire within the time for their making their award. So that the choosing the Empire doth not extinguish their authority, and therefore the Empire could not make an award upon this 19th of February. It is true the Arbitrators might chuse him upon that day, or before. But, yet still they might have made an award, and therefore he could not. Adjournatur.

Rex *versus* Episcopum Worcest', Jervason
& Hinkley in Communi Banco.

See the Case put at large in Vaughan's Reports. 53.

The Arguments of Justice *Wild*, *Archer* and *Tyrel*, were as follow. The Chief Justice's Argument is here omitted, because published at large in his own Reports.

(27.)
Traverse.

Justice *Wild*. I think the King cannot take the traverse in this Case, and this will appear by looking upon the old Books, which were not well considered by those who did reply, 13 H. 7. 13, 14. pl. 18. It is said the King may chuse, either to maintain his own Title, or traverse the Title of the party, who sues him by Petition. So 13 E. 4. 8. pl. 1. It is said when one traverses an Office, the King may either maintain the Office, or traverse the Title shewn for the party, because no man shall recover Lands against the King without having a Title. But there it is Resolved, That if the King joyn issue upon his own Title, he cannot change issue, and traverse the Title shewed for the party; Now here is the allegation of the King, that the Abbowlson was in gross, and the Defendant's denying it, is in nature of joyning an issue, which cannot be receded from. But the reason why in that Case the King might waive the traverse tendered to his Title, and traverse the Title shewn for the party, is, because the Office puts the King in actual possession; for where the King is in by Record or possession (for possession is enough) the party must make a Title, if he will recover against the King, Keil. 192. pl. 3. *Savage's Case*. It was found by Inquisition, that whereas the Turn time out of mind used to be held at Worcester, he being Sheriff for life, held it at Pedyl and Streight, Contra formam Statuti de magna Charta, upon a Scire fac. upon an Information hereupon, for forfeiting the Office, he pleads that time out of mind, &c. it used to be held at

at Pedyl, &c. absq; hoc that it used to be held at Worcester: Resolved, That the King might maintain the Inquisition, that it used to be held at Worcester, absque hoc that it used to be held at Pedyl, &c. and the reason is, because the King was intituled to the forfeiture by a Record. The difference is, where the King is Actor, as here he is, being out of possession, he must make a Title, and prove it. But where the party is Actor he cannot fix upon his own Title, and force the King to make good his own Title, ³⁴ H.8. Br. Prerog. 116. Whorewood's Case is full in point. In an Information tam quam, if the Defendant traverse, the King cannot waive the issue so tendered. One Reason indeed given is, because the King is not sole party. But the chief reason is, because the King is not intituled by matter of Record: For saith the Book, There is no Office found before the Information. But upon a traverse of an Office, & hujusmodi, saith the Book, the King may do it, because he is intituled by matter of Record; therefore in our Case the King shall not waive the issue tendered, &c. and fly upon the matter of the Defendant's Title.

Archer accordant. It must be admitted, that in this Case the King must make a Title, because by presenting of Tim. White and also of Hinkley the Defendant, the which was nine years since, he is put to his Quare Impedit, and is out of possession, I do not say of the Inheritance, though that hath been a question in the old Books, V. 2 Cro. 53. But it has been adjudged, That the Inheritance cannot be gained or divested out of the King by any Usurpations, 2 Cro. 123. 3 Cro. 241 & 519. and Green's Ca. 6 Co. 30. a. But that he may grant away the Inheritance of the Abbots' sons still, &c. But it is as clear, and agreed by all those Books, and Boswell's Case, 6 Co. 49, 50. that in such case, he must bring a Quare Impedit to recover the Presentation, for he is put out of possession of that. For as my Lord Hob. 322. observes, it is one of the things, whereupon Usurpation works more violently than upon other possessions.

Now he that is thus out of possession, and put to his Quare Impedit, must always make a Title to himself in the Declaration, Hob. 102. and this the Defendant cannot counterplead, but by conveying a Title to himself, and so avoiding the Plaintiff's alleged Title, by traverse, or confessing and avoiding, Hob. 163. Now here the Defendant hath done what he could do; he hath traversed the King's Title, why then shall

shall the King depart from his own Title, and fly upon the defective Title of the Defendant? No. *Actori incumbit onus*; he must recover by his own strength, not by the Defendant's weakness. The Defendant, by traversing the King's Title, has closed up the King, so as that he ought to take issue, and maintain his own Title.; V. 2 Cro. 651. I say therefore, That the King's declining his own Title, and falling upon the others, is a departure, which is matter of substance, and it would make pleading infinite, therefore the demurrer in this Case is good, 1 Cro. 105. is in point; and so is Hobart's Opinion in Digby versus Fitzherbert, 103, 104. And though the Judges are two and two in that Case, as it is there reported, yet the whole Court agreed it afterwards.

So that, were this a common person's Case, I suppose it would be agreed on all hands. But it is insisted, that this is one of the King's Privileges, that when his Title is traversed by the party, he may either maintain his own Title against the traverse of the party, or traverse the affirmative of the party, *Palch. pr. C. 243. a. &c.*

Answer. It is true, this is there reckoned up among many other Privileges of the King. But, first, with reverence, several of them are judged no Law, as that if the King have Title by Lapse, and he suffer another to present an Incumbent, who dies, the King shall yet present, is counter-judged, 3 Cro. 44. and both that and the next following point too, 7 Co. 28. a. Secondly, In the same Case, fol. 236. there is a good Rule given which we may make use of in our Case, viz. the Common Law doth so admeasure the King's Title and Privileges, as that they shall not take away, nor prejudice any man's Inheritance. V. 19 E. 4. 9. 11 H. 4. 37. 13 E. 4. 8. 28 H. 6. 2. 9 H. 4. 6. F. N. B. 152. Now my Brother Wild hath given the true Answer, that when the King's Title appears to the Court upon Record, that Record so intitles the King, that by his Privilege he may either defend his own, or fall upon the other's Title. For in all Cases where the King either by traverse, as 24 E. 3. 30. pl. 27. Keil. 172, 192. or otherwise, as by special demurrer, E. 3. Fitz. monst. de Faits 172. falls upon a Defendant's Title, It must be understood, that the King is intitled by Record, and sometimes it is remembred, and mentioned in the Case, Fitz. 34. That the King is in as by Office, &c. But Br. Pre. 116. the King's Attorney doth confess the Law to be

be so expressly, that the King has not this Privilege, but where he is entitled by matter of Record.

Before 21 Jac. c. 2. when the King's Titles were found by any Inquisition, or Presentment by virtue of Commissions to find out concealments, defective Titles, &c. he exercised this Privilege of falling upon, and traversing the parties Titles, and much to the prejudice of the Subjects, whose Titles are often so ancient and obscure, as they could not well be made out. Now that Statute was made to cure this defect, and took away the severity of that Privilege; Ordaining, that the King should not sue, or impeach any person for his Lands, &c. unless the King's Titles had been duly in charge to that King or Queen Eliz. or had stood insuper of Record within 30 years before the beginning of that Parliament, &c. Hob. 118.9. the King takes Issue upon the Defendant's Traverse of his Title, and could the King do otherwise, the mischief would be very great, as my Brother observed, both to the Patron and Incumbent. The Law takes notice of this, and had a jealousy, that false Titles would be set on foot for the King: and therefore 25 Edw. 3. St. 3. Car. 7. & 13 R. 2. Car. 1. & 4 H. 4. Ca. 22. enables the Ordinary and Incumbent to counterplead the King's Title, and to defend, sue, and recover against it. But a fortiori at Common Law the Patron, who by his Endowment had this Inheritance, might controvert, and Traverse the King's Title; and it is unreasonable and mischievous, that the Crown's possessions by Lapse, or, it may be, the meer suggesting a Title for the King, should put the Patron to shew, and maintain his Title, when perhaps his Title is very long, consisting of 20 mesne Conveyances; and the King may Traverse any one of them: Keilway 192. b. pl. 3. I conclude, I think the King ought to have taken Issue, and he not doing it, the Demurrer is good: and that the Defendant ought to have Judgment.

Tyrrell contra. I am not satisfied but here is a Discontinuance. For the Defendant pleads the Appendancy of the Church only, not the Chappel. It is true, he traverseth, that the Queen was not seized of both.

I deny what is affirmed, that the King by his Presentation of Timothy White, and the present Incumbent, is out of possession. By the Judgment of reversal, 2 Cro. 123.4. the Law at this day is that he cannot be put of possession of an Advowson

vobson by 20 usurpations. A Quare Impedit is an Action of Possession ; and if he were out of possession, how could he bring it ? As to this Traverse, It is a common Erudition, that a party shall not depart, and that there shall not be a Traverse upon a Traverse. But the King is excepted: 5 Co. 104. Pl. C. 243. a. Br. Petition 22. Prerogatives 59, 60, 69. & 116. It is agreed, where the King is in possession, and where he is intitled by matter of Record, he may take a Traverse upon a Traverse. And there is no Book says, that where he is in by matter of Fact, he cannot do it. Indeed there is some kind of pregnancy at least in the last of those Authorities. But I will cite two cases, on which I will rely : viz. 19 E. 3. Fitz monstr. de faits, 172. which is our case. The King in a Quare Impedit makes Title by reason of a Wardship whereby he had the custody of the Mannor, to which the Advowson belonged, and that the Father dyed seised thereof &c. and there is not a word that his Title was by matter of Record. The Defendant pleads that the Father of a Ward made a feoffment of the Mannor to him for life, and afterwards released all his right, &c. so that the Father had nothing therein at the time of his death, and that after his death, he the Defendant enfeoffed two men, &c. and took back an Estate to himself for 10 years, which term yet continues, and so it belongs to him to present. But he did not shew the release, but demurred in Judgment upon this, that he ought not to shew the release ; and the King departs from his Count, and insists upon that which the Defendant had confessed, that he had made a feoffment, which he having not shewn by the release, as he ought to make himself more than Tenant for life, was a Forfeiture, and therefore the heir had cause to enter, and the King in his right, and thereupon prays Judgment ; and has a Writ to the Bishop. Cook 86. 7 1 Inst. 304 b. The other case is 24 Ed. 3. 30. Pl. 27. which is our very case. The King brings a Quare Impedit for a Church appendant to a Mannor, as a Guardian, the Defendant makes a Title, and traverseth the Title alledged by the King in his Count, viz. the appendancy, the King replies, and Traverses the Defendants Title. For this cause the Defendant demurs, and Judgment was for the King. In this case it doth not appear in the pleading, that the King was in by matter of Record, and so it is our very case. For the King may be in by possession by virtue of a Wardship without matter of Record by Entry, &c. Stamf. Prerog. 54. I rely upon

on these two Cases. But 7 H. 8. Keil. 175. is somewhat to the purpose; Per Fitz. In a Raviſhment of Ward by the King, if the Defendant make a Title, and traverse the King's Title, the King's Attorney may maintain the King's Title, and traverse the Defendant's Title, I think there is no difference between the King's being in possession by matter of Record, and by matter of Fact.

Again, if matter of Record be necessary; here is enough, viz. The Queens Presentation under the Great Seal of England. And here is a Descent, which is and must be Jure Coronæ. It is unreasonable, that a Subject should turn the King out of Possession by him that hath no Title. This is a Privilege Case. As to the Statutes objected by my Brother Archer, they concern not this Case. The first enables the Patron to counterplead. But, here the Patron pleads.

The rest concern the King's presenting En autre droit. But here it is in his own Right. I think the King in our Case may fly upon the Defendant's Title, and there is no inconvenience in it. For the King's Title is not a bare suggestion. For, it is confessed by the Defendant, that the Queen did Present: But he alledges it was by Lapse.

For another reason, I think Judgment ought to be for the King, viz. because the Defendant has committed the first fault. For his Bar is naught, in that he has traversed the Queens Seisin in Gros; whereas he ought to have traversed the Queens Presentment modo & forma. For where the Title is by a Seisin in Gros; it is repugnant to admit the Presentment, and deny the Seisin in gros; because the Presentment makes it a Seisin in Gros. 10 H. 7. 27. pl. 7. in point, and so is my Lord Buckhurst's Case in 1 Leonard 154. The traverse here is a matter of substance. But if it be but Form it is all one. For the King is not within the Statute 27 El. cap. 5. So he concluded that Judgment ought to be given for the King.

Doctor Lee's Case.

(28.)
Priviledge.

A Motion was made by Raymond for a Writ of Priviledge, to be discharged from the Office of Expendi-
tour, to which he was elected and appointed by the Commis-
sioners of Sewers, in some parts of Kent, in respect of some
Lands he had within the Lebell. He insisted that the Doctor was
an Ecclesiastical person, Arch-deacon of Rochester, where his
constant attendance is required. Adding, that the Office, to
which he was appointed, but was a mean Office, being in the
nature of that of a Bayliff, to receive and pay some small
Sums of Money, and that the Lands in respect whereof he is
elected, were let to a Tenant, vid. 1 Cro. 585. Abdy's Case.

It was objected against this, that this Archdeacon's Prede-
cessors did execute this Office: and the Court ordered, that
notice should be given, and cause shewn why the Doctor
should not do the like.

Afterwards Rainsford & Moreton only being in Court, it
was ruled he should be priviledged. Because he is a Clergy-
man, F. B. 175. r. But I think for another reason, viz.
because the Land is in Lease, and the Tenant, if any, ought
to do the Office.

Take the Writ.

Lucy Lutterell, *vid. versus* George Reynell
Esq; George Turberville Esq; John Cory
& Ann Cory.

(29.)
Trespals.
Hob. 144.
1 Cro. 239.

THE Plaintiff as Administratrix to Jane Lutterell, duran-
te minori etate of Alexander Lutterell, the Plaintiffs
second Son, declared against the Defendants, in an Action
of Trespals, for that they simul cum John Chappell, &c.
did take away 4000 l. of the monies numbred of the said Jane,
upon the 20th day of October, 1680. and so for seven days
following the like Sums, ad dampnum of 32000 l.

Upon

Upon a full hearing of Witnesses on both sides, the Jury found two of the Defendants guilty, and gave 6000 l. damages, and the others not guilty.

A new tryal was afterwards moved for, and denied.

At the Tryal Mr. Attorney General excepted against the Evidence, that if it were true, it destroyed the Plaintiffs Action, inasmuch as it amounted to prove the Defendants guilty of Felony; and that the Law will not suffer a Man to smooch a Felony, and bring Trespasses for that which is a kind of Robbery. Indeed, said he, if they had been acquitted or found guilty of the Felony, the Action would lye; and therefore it may be maintained against Mrs. Cory, who was, as likewise was William Maynard acquitted upon an Indictment of Felony for this matter, but not against the rest. But my Lord Chief Baron declared, and it was agreed, that it should not lye in the Mouth of the Party, to say that himself was a Thief, and therefore not guilty of the Trespasses. But, perhaps if it had appeared upon the Declaration, the Defendant ought to have been discharged of the Trespasses.

Quære, What the Law would be, if it appeared upon the pleading, or were found by special Verdict.

My Lord Chief Baron did also declare, and it was agreed that whereas W. Maynard, one of the Witnesses for the Plaintiff, was guilty as appear'd by his own Evidence, together with the Defendants, but was left out of the Declaration, that he might be a Witness for the Plaintiff, that he was a good and legal Witness; but his credit was lessened by it, for that he swore in his own discharge. For that when these Defendants should be convicted, and have satisfied the Condemnation, he might plead the same in Bar of an Action brought against himself. But those in the simul cum were no Witnesses.

Several witnesses were received and allowed, to prove that William Maynard did at several times discourse and declare the same things, and to the like purpose, that he testified now. And my Lord Chief Baron said, though a hear-say was not to be allowed as a direct Evidence, yet it might be made use of to this purpose, viz. to prove that William Maynard was constant to himself, whereby his Testimony was Corroborated.

One Thorne, formerly Mr. Reynell's Servant, being Subpoenaed by the Plaintiff to give Evidence at this Tryal, did not appear. But it being sworn by the Exeter Waggoner,

that Thorne came so far on his Journey hitherward, as Blandford, and there fell so sick, that he was not able to travel any farther, his Depositions in Chancery, in a Suit there betwixt these parties, about this matter, were admitted to be read.

Smith *versus* Smith.

(30.)

A *Stumpsit*; The Plaintiff declared, whereas himself, and the Defendant were Executors of the last Will and Testament of J. S. and whereas the Defendant had received so much of the money which was the Testator's, a moiety whereof belonged to the Plaintiff; and whereas the Plaintiff *Pro recuperatione inde Sectasset* the Defendant, that he the said Defendant, in consideration that the Plaintiff abstineret a *Secta predicta prosequenda & monstraret quoddam Computum* did promise him 100 l. and avers, that he did forbear, &c. & *quod ostentavit quoddam Computum prædictum*.

After a Verdict for the Plaintiff, it was moved in arrest of Judgment by Jones for the Defendant, as followeth; Though I do not see how that which one Executor claims against another, is recoverable at all, unless in Equity; yet I shall insist only on this, that here is no good consideration alledged; for it is only alledged in general, that the Plaintiff *Sectasset*. It is not said so much as that it was *legali modo*, in a legal way, whereas it ought to be set forth in what Court it was, &c. that so the Court might know whether it were in a Court which had Jurisdiction therein, or no; and so are all the Presidents in Actions concerning forbearance to sue. In point of Evidence the first thing to be shewn in such a Case as this, is, that there was a Suit, &c.

Saunders for the Plaintiff, That being the prime thing necessary to be proved, since the Verdict is found for us, must be intended to have been proved. But however, if this consideration be idle and void, yet the other maintains the Action; and so the Court agreed, viz. that one was enough. It was agreed, that if the Plaintiff averred only that he had shewed *Quoddam Computum*, that unless the consideration had been to shew any account, it had been naught: for *quoddam* is aliud. Dyer 70. num. 38, 39. 1 H. 7. 9. but it being *Quoddam computum*

putum prædict', it was well enough. Computum prædictum, refers it to the particular account discoursed of between them.

It was argued, that it had been best to have said *Monstravit* Ant. 43. in the averment, that it might agree with the allegation of the consideration. But yet the word *ostentavit*, though most commonly by a Metonymy, it signifies to boast, yet signifieth also to shew, or to shew often, as appears by all the Dictionaries: and therefore it is well enough. Take Judgment.

Sir Francis Duncomb's Case.

IT was held, If a Writ of Error abate in Parliament, or the like, and another Writ of Error be brought in the same Court, it is no Superfedeas. But if the first Writ of Error be in Cam. Scacc', &c. and then a Writ be brought in Parliament, &c. it is a Superfedeas, by the Opinion of all the Judges against my Lord Coke, vide *Heydon versus Godsalve*, 2 Ro. 492. 2 Cro. 342. (31.)

Brown versus London.

INdeb' Assumpsit for fifty three pounds due to the Plaintiff upon a Bill of Exchange drawn upon the Defendant, and accepted by him, according to the custom of the Merchants, &c. After a Verdict for the Plaintiff, it was moved in arrest of Judgment, that though an Action upon the Case does well lie in such case, upon the Custom of Merchants, yet an Indeb. Assumpsit may not be brought thereupon. 1. Inst. 232. 1. 20. 140. (32.) 1. 20. 140.

Winnington. I think it doth well lye. Debt lies against a Sheriff upon leying and receiving of money upon an Execution, Hob. 206. Now this is upon a Bill of Exchange accepted, and also upon the Defendant's having Effects of the drawer in his Hands, having receiv'd the value; for so it must be intended, because otherwise this general Verdict could not be found.

Rainf-

Rainsford. This is the very same with Milton's Case lately in Scacc', where it was adjudged, that an Indeb. Assumpsit would not lye. In this Case he added, that the Aerdia would not help it; for though my Lord Chief Baron said it were well, if the Law were otherwise, yet he and we all agreed that a Bill of Exchange accepted, &c. was indeed a good ground for a special Action upon the Case: but that it did not make a Debt; first, because the acceptance is but conditional on both sides. If the Money be not received, it returns back upon the drawer of the Bill; he remains liable still, and this is but collateral. 2. Because the word Onerabilis doth not imply Debt. 3. Because the Case is *primæ Impressionis*: there was no President for it. Then Osley, who was of Council pro Defendente in the Case at Bar said, That he was of Council for the Plaintiff in the Exchequer Case, and that therein direction was given to search Presidents; and that they did search in this Court, and in Guildhal, and that there was a Certificate from the Attornies and Prothonotaries there, that there was no President of such an Action. Adjournatur.

Twifden. I remember an Action upon the Case was brought, for that the Defendant had taken away his Goods, and hidden them in such secret places, that the Plaintiff could not come at them to take them in Execution; and adjudged it would not lye.

Watkins *versus* Edwards.

(33.) **A**ction of Covenant brought by an Infant per Guardian suum, for that the Plaintiff being bound Apprentice to the Defendant by Indenture, &c. the Defendant did not keep, maintain, educate, and teach him in his Trade of a Draper, as he ought; but turn'd him away. The Defendant pleads that he was a Citizen and Freeman of Bristol; and that at the general Sessions of the Peace there held, there was an Order, that he should be discharged of the Plaintiff for his disorderly living, and beating his Master and Mistress, and that this Order was enrolled by the Clerk of the Peace,

Peace as it ought to be, &c. To which the Plaintiff demurred.

It was said for the Plaintiff, that the Statute 5 El. cap. 4. doth not give the Justices, &c. any power to discharge a Master of his Apprentice in case the fault be in the Apprentice, but only to minister due Correction and Punishment to him.

Cur'. That hath been over-ruled here. The Justices, &c. have the same power of discharging upon complaint of the Master, as upon complaint of the Apprentice. Else that Master would be in a most ill case that were troubled with a bad Apprentice : for he could by no means get rid of him. Secondly, it was urged on the Plaintiffs behalf, that he had not, for ought that appears, any notice or summons to come and make his defence, vid. 11 Co. 99. Bagg's Case. And this very Statute speaks of the appearance of the Party, and the hearing the matter before the Justices, &c.

Sanders pro Defendente. In this case the Justices are Judges, and it being pleaded, that such a Judgment was given, that is enough, and it shall be intended all was regular.

Twisden & Rainsford. That which we doubt is, whether the Defendant ought not to have gone to one Justice &c. first, as the Statute directs, that he might take order and direction in it; and then, if he could not compound and agree it, he might have applied himself to the Sessions. For the Statute intended there should be, if possible, a compolure in private; and the power of the Session is conditional, viz. if the one Justice cannot end it. In case of a Bastard Child they cannot go to the Sessions per saltum; and we doubt they cannot in this Case; it is a new Case. And then the matter will be, whether this ought to be set down in the Pleading. Adjornatur.

Rex versus Ledgingham.

(34.)
Supra 71. pl. 25.

Information setting forth, that he was Lord of the Man-
nor of Ottery St. Mary, in the County of Devonshire,
wherein there were many Copholders and Freeholders, and
that he was a Man of an unquiet mind, and did make unrea-
sonable Distresses upon several of his Tenants, and so was
communis oppressor & perturbator pacis. It was proved at
the Trial, that he had distrained four Oxen for three pence,
and six Cows for eight pence, being Amercements for not
doing Suits of Court, and that he was Communis oppres-
sor & perturbator pacis. The Defendant was found Guilty.

It was moved in arrest of Judgment, that the Information
is ill laid: First, It is said he disquieted his Tenants, and
vexed them with unreasonable distresses. It is true, that is a
fault, but not punishable in this way. For by the Statute of
Marlebridge; cap. 4. vid. 2. Inst. 106, 7. he shall be punished
by grievous Amercements, and where the Statute takes care
for due punishment, that method must be observed. 2. As
to the matter it self, they do not set forth how much he did
take, nor from whom; so that the Court cannot judge whe-
ther it is unreasonable or no, nor could we take issue upon
them. 3. As to the words Communis oppressor & perturbator
pacis, they are so general, that no Indictment will lye upon
them 2 Ro. 79. Jones 302. Cornwall's Case, which indeed goeth
to both the last points.

Twifden. Communis oppressor, &c. is not good, such ge-
neral words will never make good an Indictment, save only
in that known Case of a Barretor, for Communis Bar-
rectator is a term which the Law takes notice of, and under-
stands; It is as much, as I have heard Judges say, as a
Common Knave, which contains all Knavery. For the
other point, an Information will not lye for taking outragi-
ous Distresses. It is a private thing for the which the Statute
gives a Remedy, (viz.) by an Action upon the Statute
tam quam.

Cur. It is naught. Adjorn.

2 Rol. 79.

Ante 71.

Roberts *versus* Marriot.

AN Action of Debt brought upon a Bond to submit to an award. The Defendant pleads, Nullum fecerunt arbitrium. The Plaintiff replies, and sets forth an award made by two Prebends of Westminster, and that it was delivered to the party, according to the condition of the Bond, &c. The Defendant rejoyns, that it was not delivered, &c. Et hoc paratus est verificare. The Plaintiff demurs. Serjant Baldwynne and Winington pro defend. Jones pro querente. Cur. The Defendant having first pleaded, Nullum fecer' arb. and then in his Rejoinder that it was not delivered (which is a Confession that there was an award made) has committed a departure; and so it has been Judg. ed. If he had pleaded Nullum fec' arbitrium, &c. absque hoc that it was tendered, &c. it had been naught: and it is as bad now. Also when the Plaintiff replies, that the award was delivered, and the Defendant saith, It was not, he should have concluded to the Country, and not as he doth, hoc paratus est verificare; for otherwise the party might go in infinitum; and there would be no end of pleading. Note, there was an Exception taken to the award (viz.) that it was awarded that there should be a release of all Specialties among other things; whereas Specialties were not submitted. (35.) Sand. 188.

Cur. Then the award is void as to that only. But indeed if the breach had been assigned in not releasing the Specialties, it had been against the Plaintiff. But now take Judg. ment. Ant. 227. Ant. 72. Sand. 102. 8. Co. 133.

Wood *versus* Davies.

TROV. & conv. de. tribus struib. sceni, Anglice, Ricks of Hay. Moved in arrest of Judgment, that it was too uncertain. For no man could tell how much was meant by strues. It was urged it should have been so many Cart-loads, or the like. For loads was adjudged uncertain in Glyn's time (36.) Trover Ant. 46.

time here, But Rainsford and Moreton, who only were in Court, judged it well enough.

John Wootton *versus* Penelope Hele *Vide*
Mich. 21 Rot. 210.

(37.)
Supra. 66. pl. 14

Covenant upon a fine. The Plaintiff declares, That whereas quidem finis se levavit in Curia nuper pretenf. Custodum libertatis Angliæ autoritate Parlamenti de Banco apud Westmonast', &c. a die Sancti Michaelis in unum mensem anno Domini, 1649. Coram Olivero St. John, Johanne Pulifon, Petro Warburton, & Leonard' Atkins, Justic, &c. inter præd. Johannem Wotton, &c. quer' & præd' Johannem Hele, & Penelopen Hele per nomina Johannis Hele Armigeri, & Penelopes uxoris ejus deforc' inter alia de uno Messuagio, &c. Per quem finem præd' Johannes Hele & Penelope concesserunt præd. tenementa præd. Johan. W. habendum & tenendum, &c. pro termino 99 annorum proximorum post decessum Gulielmi Wootton, &c. si Johannes Wootton modo querens & Gracia Wootton tamdiu vixerint, aut eorum Alter tamdiu vixerit, & præd' J. H. & Penelope & hæred. ipsius Johannis Warant' præd. Jo. W. præd' tenementa, &c. Contra omnes homines pro toto termino præd. prout per Recordum finis præd. &c. plenius apparet, Virtute cujus quidem finis præd. J. W. fuit possessionat' de interesse præd' termini, &c. & sic inde possessionat' existens præd' Guliel' W. &c. postea, scil. sexto die, &c. obierunt, post quorum mortem præd. J. W. in tenementa præd. &c. intravit & fuit inde possessionat' &c. & sic inde possessionat' existens præd. J. H. postea, scil. &c. obiit & præd. Penelope ipsum supervixit & idem Johannes W. in facto dicit quod quidem Hugo Stowel Armiger, post commensationem termini præd. & durante termino illo & ante diem Impetrationis hujus. Billæ, scil. &c. habens legale jus & titulum ad tenementa præd. &c. in & super possessionem termini præd. ipsius J. W. in eisdem intravit ipsumq; J. W. contra voluntatem ipsius J. W. per debitum Legis processum a possessione & occupatione tenementorum præd. ejecit, expulit, & amovit, ipsumq; J. W. sic inde expuls. a possessione sua inde custodivit & Extra tenuit &

& adhuc Extra tenet, Contra formam & effectum finis & Warrant. præd. & sic idem præd. J. W. dicit quod præd. Penel. post mortem præd. J. W. licet sæpius requisit', &c. Conventionem suam præd. Warrant' præd. non tenuit sed infregit, & J. H. eidem J. W. tenere omnino recusavit & adhuc recusat ad dam. &c. 600 l. **The Defendant pleads,** Representando quod eadem Penelope conventionem suam Warrant' præd. a tempore levationis finis præd. ex parte sua custodiend. hucusq; bene & fideliter custodivit, representandoq; quod præd. Hugo Stowell præd. tempore intrationis ipsius Hugonis in tenementa præd. non habuit aliquod Legale Jus aut titulum ad eadem tenementa, &c. pro placito eadem Penel. dicit, quod præd. H. Stow. ipsum Johannem a possessione & occupatione tenementor. non ejecit. expulit & amovit, prout præd. Johannes superius versus eam narravit, & hoc parat' est verificare. Upon this issue was taken, and a Verdict for the Plaintiff was found, and 300 l. damages. And upon a motion in arrest of Judgment, the Cause was spoken to three or four times.

Jones pro Defendent'. 1. It is considerable, whether an Action will lie against a Feme upon a Covenant in a Fine levied by her, when Covert-Baron. It would be inconvenient that Land should be unalienable, and therefore the Law enables a Feme Covert to levy a Fine. Which Fine shall work by Estoppel, and pass against her a good Interest. But to make her liable to a personal Action thereupon, to answer damages, &c. it were hard, and it is Casus primæ impressio- nis. For the Plaintiff it was said, there is little question but an Action of Covenant will well lie upon this warranty. The Law enables a Feme Covert to corroborate the Estate she passes, and to do all things incident. If she levy a Fine of her Inheritance, she may be vouched, or a Warrantia Chartæ, &c. thereupon be had against her, and so is Roll versus Osborn, Hob. 20. and if she can thus bind her Land a fortiori she may subject her self to a Covenant, as in the Case at the Bar. If a Husband and Wife make a Lease for years, and she accept the rent after his death, she shall be liable to a Covenant.

This Point was agreed by the Council on both sides, that a Covenant in this Case would lie against her, and so this Court agreed.

Twiss. added, That there was no question but a Covenant would lie upon a Fine. For (saith he) sealing is not always

necessary to found an Action of Covenant. Thus Covenant lies against the King's Lessee by Patent, upon his Covenant in the Patent, though we know there is no sealing by the said Lessee.

Secondly, It was urged on the Defendants behalf, That the breach of Covenant is not well assigned, for it is not shewed what Title Stowell had. It is not only participially expressed, Habens Legale, &c. but what is said, is altogether general and uncertain: Jus & Legalem titulum ad tenementa præd', so that the breach assigned is in effect no more but that Stowell entered, and so the Covenant was broken. If a man plead Indemn. Conservat. he must shew how. Gyll. versus Gloss. Yelverton 227. 8. 2 Cro. 312. Debt for Rent on a parol Lease, the Defendant pleads, That the Plaintiff nil habuit in tenementis prædictis, unde dimissionem prædictam facere potuit. The Defendant replies, Quod habuit, &c. in general, without shewing in special what Estate he had, that so it might appear to the Court, that he had sufficient in the Lands whereout to make the Lease; and therefore the Replication was adjudged naught. It is true, it was adjudged, That after the Verdict, it was helped by the Stat. of Jeoffails. But that I conceive was, because the issue, though not very formal, yet was upon the main point, viz. Whether the Lessor had an Estate in the Tenements or no. For the true reason why a Verdict doth help in such a Case, is, because it is supposed that the matter left out was given in Evidence, and that the Judges did direct accordingly; or else the Verdict could not have been found. So in our Case, If the issue had been, Whether Stowell had Right, &c. it might have been supposed and intended by his special Title and Estate made out and proved by trial. But here the issue going off on a Collateral point, it cannot be intended, that any such matter was given in Evidence.

Jones and Pollexfen for the Plaintiff. This Objection is against all the Precedents, by which it appears, that alledging generally as we do, habens Legale Jus & Titulum is good. It is sufficient for a man to alledge, that the Covenantor had no power to demise, or was not seized, &c. without shewing any cause why, or that any other person was seized, &c. 9 Co. 61. 2 Cro. 304. 369. 70. It is to be inquired upon Evidence Whether the party had a good Title or no, and so the Court agreed.

Thirdly,

2 Co. 4. a.
2 Snd 180.

Co. Ent. 117. a.

Thirdly, Sanders for the Defendant said, Though the Plaintiff was very wary, bringing in the Right of Stowell with a Participle only, so that we could not take issue upon it; we could only protest: yet I agreed, that having taken issue upon one Point, we must admit, and do admit the rest of the matter in the Declaration. But that is only as it is alledged. Now here therefore we must admit, that Stowell had Right and Title, &c. But we do not admit that he had a Title precedent to this Fine, or had right otherwise than from and under the Plaintiff himself; for that is not alledged, And it shall never be intended, no not after Verdict, that Stowell had good and Eigne Right and Title, before the Lease granted by the Fine, but the contrary shall be intended. And for that I rely upon Kirby versus Hanfaker, 2 Cr. 315. By all the Judges of C. B. and Scacc in Cam. Scacc in Point. Nay that is a stronger Case than ours is. For there the issue which was found for the Plaintiff, was that the Recovery by Essex, who answers to Stowell in our Case, was not by Covin, but by lawful Title. And yet, because it was not alledged, that he had a good and Eigne Title, it was held to be ill, and not helped, and the Judgment was reversed. The saying that Stowell ejected him, &c. Contra formam & effectum Finis & Warrant præd', or if it had been Contra formam & effectum Conventionis præd', is absurd, and helps nothing. For Stowell could not do so, because he is not party to the Fine.

Ant. 101

Jones for the Plaintiff. It can never be intended that Stowell entred, &c. by a Title under us, because it is alledged to be Contra formam, & effectum Finis & Warrant præd', & Contra voluntatem ipsius J. W. & eum a possessione sua Custodivit, &c. had it been by Lease under us, the Defendant should have pleaded it. I doubt whether the Defendant could have demurred. But certainly, now the Jury have found all this, it can never be intended as they would have it: As to the Case, that has been cited, between Kirby and Hanfaker; I say it is not so clearly alledged there, as here: It is not said there, that the Lessee was possessed, and that the Recoveror entred into, and upon his possessions; and ejected him. 2. These words Contra formam, &c. are not in that Case. 3. In that Case the Court of King's Bench was of Opinion, That the Verdict had made it good.

4. The Roll of that Case is not to be found; here is a man will

will make Oath that he hath searched four years before and after the time when that Case is supposed to have been and cannot find it.

Rainsford and Moreton were at first of Opinion, That the Verdict had helped it. For saith Rainsford, If Stowell had Title under the Plaintiff, it could not have been found, that there was a breach of Covenant. But afterwards they said, that Kirby and Hanfaker's Case came so close to it, that it was not to be avoided, and they were unwilling to make new Precedents.

Twifden. That Book is so express'd, that it is not an ordinary authority, it is not to be waved. But I was of the same Opinion, before that Book was cited. For here it is possible Stowell might have a Lease from Wootton since the Fine. Now the warranty doth not extend to Puifne Titles. The Defendant should have said that Stowell had Priorem Titulum, &c. when a good Title is not set forth in the Declaration to entitle the Plaintiff to his Action, it shall never be helped. There was an Action upon the Stat. of Monopolies, for that the Defendant entred, I suppose, by pretext of some Monopoly-Commission, &c. & detainit certain goods. But it was not said, they were his the Plaintiffs, and though we had a Verdict, yet we could never have Judgment. In 3 Car. there was an Action brought upon a Promise to give so much with a Child, quantum daret to any other Child; and it was alledged, that dedit so much, and because that it might be before the time of the promise, it was held naught after Verdict.

It may be the Roll of Kirby versus Hanfaker is not to be found, no more than the Roll of Middleton versus Clesman, reported, Yelv. 65. But certainly Justice Crook and Yelverton were men of that Integrity, they would never have reported such Cases, unless there had been such. There are many losses, miscarriages and mistakes of this kind. Pray, where will you find the Roll of the Decree for Titles in London, yet I have heard the Judges say, They verily believe it is upon a wrong Roll.

Nil Capiat per Bill.

Rex versus Neville.

Indictment for erecting a Cottage for habitation contra Stat
 quasht, because it was not said, That any inhabited it. For
 else it is no offence, per Rainsford & Moreton, qui soli ade-
 rant.

(38.)

31 El. cap. 7.
Stiles. 33.*Jemy versus Norrice.*

A Writ of Errour was brought of a Judgment given in
 the Common Pleas, in an Action upon a quantum me-
 ruit, for Wares sold. First, One of them is unum par
 Chirothecarum; But it is not said of what sort. Twisden.
 It is good enough however, so it has been held de Coriis,
 without saying Bovinis, &c. Libris, without saying what
 Books they were. Secondly, Another is parcella fili: which,
 it was said, was uncertain; unless it had been made cer-
 tain by an Anglice. For though it was agreed it had been
 good in an Indeb. assumpsit, yet in this Case there must be
 a certainty of the debt. Such a general word cannot be good,
 no more than in a Trover. Twisden. If an Indeb. assumpsit
 should be brought for 20 l. for Wares sold, and no Evidence
 should be given of an agreement for the certain price, I
 should direct it to be found especially. But parcella fili seems
 to be as uncertain, as Pairs of Hangings, Cur. It is doubt-
 ful. But however, affirmetur nisi, &c.

(39.)

2 Sand. 374.

Foxwist & al. versus Tremayneaut, Trin.
21 Rot. 1512. V. Super.

(40.)
Ant. 47, 72.

FOR the Plaintiff. The two parties, who are Infants, may well sue by Attorney, as they do. The Authorities are clear, 2 Cr. 441. 1 Ro. 288. Weld versus Rumney in 1650. Styles 318. We beg leave to mention especially what you Mr. Justice Twisen said there; though indeed we do not know, nor can be very confident that it is reported right. Twisden. I do protest not one word of it true they went about. But 3 Cro. 541. and especially 378. is express in our Point. In Rot. 288. num. 2. Indeed there is a Quære made, because an Infant might by this means be amerced, But that reason is a mistake, for an Infant shall not be amerced, Dyer 338. 1 Inst. 127. a. 1 Ro. 214.

5. Co. 29.
6. Co. 67. 6.

1. Ben. 101.

Moreton. I take the Law to be, that where an Infant sues with others in autre droit, as here, he shall sue by Attorney; for all of them together represent the Testator. I ground my self upon the Authorities, which have been cited, and Yelv. 130. Also it is for the Infants advantage to sue by Attorney. But if he be a Defendant he may appear by Guardian, Popham 112.

I think the parties may all joyn in this suit, though perhaps in Hatton versus Maskew they could not: For in that Case it appeared that the wife only, who was Plaintiff, was Executrix. So he concluded, that Judgment ought to be given for the Plaintiffs.

1. Leon. 74.

Rainsford accordant. This Case is stronger than where a single person is made Executor or Administrator. For though Ro. 288. num. 2, makes a Quære of that, yet Num. 3. which is our Case, he agrees clearly with the Countess of Rutlands Case, in 3 Cro. 377. 8. That the Infant as well as the other Executors shall sue by Attorney. The Reasons objected on the contrary are, That an Infant cannot make an Attorney, and that he may be prejudiced hereby. I answer, That the Executors of full age have influence upon the Infants, and they are entrusted to order and manage the whole business. And therefore Administration durante minori ætate shall not be granted, so in this Case, he shall have privilege to

to sue by Attorney, because he is accompanied with those which are of full age. I conclude, I have not heard of any Authority against my Opinion: and how we can go over all the Authorities cited for it, I do not know.

Twissden contra. This is an Action upon the Case, for that the Defendant was indebted for damages clear received to the Testator's Use. And indeed, I do not see otherwise, how it would lie. Two questions have been made: First, Whether all the Executors may, or must joyn: I confess I have heard nothing against this, viz. but that they may joyn. But I cannot so easily as my Brothers stubber over all the Authorities cited (viz.) *Hatton versus Maskew*, which, I confess, is a full authority for this that they need not joyn. The Case was thus; The Testator recovers a Judgment, and dies, making his Will thus. Also, I devise the residue of my Estate to my two Daughters, and my Wife, whom I make my Executrix. I confess I cannot tell why, but the Spiritual Court did judge them all, both the two Daughters, as well as the Wife, to be Executrices; and therefore we the Judges must take them to be so. The Wife alone proves the Will with a reservata potestate to the Daughters, when they should come in. But this makes nothing at all in this Case; I think this is according to their usual form. The Wife alone sues a Scire facias upon this Judgment, and therein sets forth this whole matter, viz. that there were two other Executrices, which were under seventeen &c. It was adjudged for the Plaintiff, and affirmed in a Writ of Error in Cam. Scacc, that the Scire facias was well brought by her alone. But first, I cannot see how a Writ of Error should lie in that Case in Cam. Scacc. For it is not a Cause within 27 Eliz. 2. What reason is there for Judgment? a reason may be given, that before an Executor comes to seventeen, he is no Executor. But I say he is quoad esse, though not quoad Executionem. A Wife Administratrix under seventeen shall joyn with her Husband in an Action; and why shall not the Infants as well in our Case? *Yelv. 130.* is expels that the Infant must joyn, and be named. It is clear, that no Administration durante minori ætate can be committed in this Case. For all the Executors make but one person, and therefore why may not all joyn? 2. Admitting they may joyn, whether the Infants may sue by Attorney? I hold that in no Case an Infant shall sue or be sued either in his own, or autre droit, by Attorney.

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There

1 Rol. 747.
Ant. 340, 400.
Post. 747.

There are but four ways by which any man can sue ; In propria persona, per Attornatum, per Guardianum and per Procheinamy. An Infant cannot sue in propria persona ; That was adjudged in Dawkes versus Peyton. It was an excellent Case, and there were many notable Points in it. First, It was Resolved, That a Writ of Errour might be brought in this Court upon an Errour in Fact in the Petty Bagg. 2. That the Entry being general (venit such a one) it shall be intended to be in propria persona. 3. That it was Errour for the Infant in that Case, to appear otherwise than by a Guardian. 4. That the Errour was not helped by the Statute. of Jeoffails. In a Case between Colt & Sherwood, Mich. 1649. an Infant Administrator sued and appeared per Guardianum ; and it appeared upon the Record that he was above seventeen years of age. I was of Council in it, and we insisted it was Errour, but it was adjudged, That he appeared as he ought to appear ; and that he ought not to appear by Attorney. And the Reasons given were ; First, Because an Infant cannot make an Attorney by reason of his inability. Secondly, Because by this means an Infant might be amerced pro falso Clamore. For when he appears by Attorney non constet ; unless it happen to be specially set forth, that he is an Infant, and so he is amerced at all adventures ; and to relieve himself against this he has no remedy, but by a Writ of Errour. For Errour in Fact cannot be assigned ore tenus. And it were well worth the Cost to bring a Writ of Errour to take off an amercement.

Sand. 212.

But it is said, That the Infants may appear by Attorney in this Case, because they are coupled and joyned in company with those of full age. I think that makes no difference, for that reason would make such appearance good, in case that they were all Defendants. But it is agreed, That if an Infant be Defendant with others who are of full age, he cannot appear by Attorney. The reason is the same in both Cases. If an Infant and two men of full age joyn in a Feoffment, and make a Letter of Attorney, &c. this is not good, nor can in any sort take away the imbecility which the Law makes in an Infant.

I conclude, I think the Plaintiffs ought to joyn ; but the Infants ought to appear by Guardian. But since my two Brothers are of another mind, as to the last Point, there must be Judgment that the Defendant respondeat ouster.

Nota

Nota, Coleman argued for the Defendant ; his Argument, which ought to have been inserted above, was to this effect : First, These five cannot join ; had there been but one Executor, and he under seventeen years, the Administrator durante minori, &c. ought to have brought the Action, 5 Co. 29. a But since there are several Executors, and some of them of full age, there can be no Administration durant' minor'. Those of full age must Administer for themselves, and the Infants too. But the course is, that Executors of full age prove the Will, and the other, that is under age, shall not come in till his age of seventeen years. But now the question is, How this Action should have been brought ? I say according to the President of Hatton versus Maskew, which was in Cam. Scacc. Mich. 15 Car. 2. Rot. 703. wherein the Executor who was of full age brought the Scire fac. but set forth that there were other two Executors who were under age, and therefore they which were of full age pray Judgment. It was resolved the Scire fac. was well brought, and they agreed, That the Case in Yelverton 130. was good Law ; because in that Case it was not set forth specially in the Declaration, that there was another Executor under age. So that they Resolved, That the Executor of full age could not bring the Action without naming the others. 2. However the Infants ought to sue by Guardian, and where Rolls and other Books say that where some are of age, and some under, they may all sue by Attorney : It is to be understood of such as are indeed under 21, but above 17. Respondens ouster.

After this the Suit was Compounded.

Term. Pasch. 22 Car. II. Regis.

*J. C. 2. Cha. Rep. 26.**J. C. when at law
Ante 86. of the book
then cited.**Sheweth report of same
case both in equity & at
law Lord Chancellor.**Both in equity & at law
of Equity in 20, 21.
20.*

*The great Case in Cancellaria, between Charles
Fry and Ann his Wife, against George
Porter.*

Resolved,

That there is no Relief in Equity against the Forfeiture
of Land limited over by Devise in Marrying, with-
out consent, &c. Many particulars concerning
Equity.

(I.)

Ante 86. pl. 50.
2 Cha. R. 26.
2 Keb. 756.

The Case was ; Montjoy Earl of Newport was seized
of an house called Newport-house, &c. in the Coun-
ty of Middlesex, and had three Sons, who were then
living, and two Daughters, Isabel married to the
Earl of Banbury with her Father's consent (who had issue A.
the Plaintiff) and Ann married to Mr. Porter, without her
Father's consent (who had issue D.) both these Daughters
died. The Earl of Newport made his Will in this manner :
I give and bequeath to my dear wife the Lady Ann Countess
of Newport, all that my House called Newport-house, and all
other my Lands, &c. in the County of Middlesex, for her life.
And after her death I give and bequeath the premises to my
Grand-child Ann Knollis, viz. the Plaintiff, and to the heirs
of her body. Provided always, and upon condition that she
marry with the consent of my said Wife, and the Earl of War-
wick, and the Earl of Manchester, or of the major part of
them. And in case she marry without such consent, or happen
to dye without issue, Then I give and bequeath it to George
Porter, viz. the Defendant. The Earl died. Ann the Plain-
tiff married Charles the Plaintiff, she being then about four-
teen or fifteen years old, without the consent of either of the
Trustees. And thereupon now a Bill was preferred to be re-
lieved against this Condition and Forfeiture, because she had
no

no notice of this Condition and Limitation made to her, &c. To this the Defendant had demurred, but that was overruled. Afterwards there were several Depositions, &c. made and testified on each side, the effect of which was this. On the Plaintiffs part it was proved by several, that it was always the Earl's intention, that the Plaintiff should have this Estate, and that they never heard of this purpose to put any Condition upon her; and believed that he did not intend to give away the Inheritance from her; But that this Clause in the Will was only in terrorem, and Cautionary, to make her the more obsequious to her Grandmother. The two Earls swore that they had no notice of this clause in the Will; but if they had, they think it possible such reasons might have been offered, as might have induced them to give their consents to the Marriage; and that now they do consent to, and approve of the same. Some proof was made, that the Countess of Newport had some design that the Plaintiff should not have this Estate, but that the Defendant should have it. But at last even she, (viz. the Countess) was reconciled, and did declare that she forgave the Plaintiffs Marriage, and that she shewed great affection to a Child which the Plaintiff had, and directed, that when she was dead, the Plaintiff and her Child should be let into the possession of the premises, and should enjoy them, &c. It was proved also, that when there had been a Treaty concerning the Marriage between my Lord Morpeth and the Plaintiff, and the Plaintiff would not marry him, her Grandmother said she should marry where she would; she would take no further care about her, (the Countess was dead at the time of this Suit :) It was proved that Mr. Fry was of a good Family, and that the Defendant had 5000 l. appointed and provided for him, by his Grandfather, by the same Will.

On the Defendant's part, It was sworn by the said late Countess of Newport, viz. In an Answer made formerly to a Bill brought against her by the now Defendant for preferring of Testimony (which was ordered to be read) that the Marriage was private, and without her consent and approbation, and that she did not conceive it to be a fit and proportionable Marriage, he being a younger Brother, and having no Estate.

The like was sworn by the Earl of Portland, the said Countess's then Husband, and that it appeared she leapt over a Wall (by means of a Wheel-Barrow set up against it) to go
to

*See 2^d Nottingham's
M. v. Poley. 4
Equity ch. 29. pl.
14.*

to be married, and that as soon as the Trustees did know of the Marriage, they did disavow and dislike it, and so declared themselves several times, and said, That had they had any hint of it, they would have prevented it.

Others swore that the Earl of Portland declared upon the day of her going away, That he never consented thereto, and that the Countess desired then, that he would not do any thing like it, and that the Earl of Warwick said, He would have lost one of his Arms rather than have consented to the said Marriage.

On hearing of this Cause before the Master of the Rolls, viz. Sir Harbottle Grimstone, Baronet, the Plaintiff obtained a decretal Order, (viz.) That Anne the Plaintiff and her Heirs should hold the Premises quietly against the Defendant and his Heirs, and that there should be an Injunction perpetual against the Defendant, and all claiming under him.

And now there was an Appeal thereupon, and Rehearing before Sir Orlando Bridgman, Knight, then Lord-Keeper, assisted by the two Lord Chief Justices, and the Chief Baron, before whom it was argued thus :

Serjeant Maynard. The Plaintiff ought not to have relief in this Case. The Plaintiffs Mother had a sufficient provision by the Earl of Newport's Care. And therefore there is less reason that this Estate should be added to the Daughter. The noble Lords, the Trustees, when the thing was fresh, did disapprove the Marriage, however they may consent thereunto now. The Devise was to the Plaintiff, but in tail, and afterwards to the Defendant. We disparage not Mr. Fry in blood, nor Family ; But people do not marry for that only, but for Recompence and like Fortune.

There was a publique Fame or Report (it is to be presumed) of this Will in the House ; and were there not, yet it was against her Duty, and against Nature, that she should decline asking her Grand-Mother's consent ; and Mr. Fry in Honour and Conscience ought to have asked it ; And therefore this practice ought not to receive the least encouragement in Equity. 'Tis true, when there was a Demurrer, it was over-ruled, because the Bill prayed to be relieved against a Forfeiture, for which there might be good cause in Equity. But now it does not appear there is any in the Case. The
Estate

Estate is now in the Defendant, and that not by any act of his own, but by the Devisee and the Plaintiff, this is a Limitation, not a Condition. For my Lord Newport had Sons; It is somewhat of the same effect with a Condition, though it is not so. We have a Title by the Will of the dead, and the act of the other party, without fraud or other act of us, and therefore it ought not to be defeated.

I take a difference between a devise of Land and money. For Land is not originally devisable, though Money is. By the Civil Law, and amongst civil Lawyers, it has been made a question, Whether there shall be Relief against such a Limitation in a Devise. But be that how it will, Chattels are small things, but a freehold settled ought not to be devised thus. No man can make a Limitation in his Will better and stronger to disappoint his Devise, conditionally than this is made. If my Lord Newport had been alive, would he have liked such a practice upon his Grand-daughters as want of Notice? In Organ's Case and Sir Julius Caesar's Case, there was a Grant to an Infant, on condition to pay 10 s. and no Notice given thereof before 'twas payable; yet because no body was bound to give notice, it was adjudged against the Infant.

Sir Heneage Finch Solicitor General. The Witnesses who swear that the Earl said, He would give the Estate to her, prove nothing to the purpose. For he did so, but upon a condition, That they did not hear. The after-consent of the Earls or the Countess ought not to make it good; which consent at last perhaps was extorted by importunity or compassion. For at first they disapproved the Marriage. Marrying without consent, and dying without issue, are coupled in the same Line, and the Estate shall as effectually pass over to the Defendant upon the one Limitation as the other.

For such consent is matter ex post facto, and suspiciously to be scan'd; For we ought in this Case by Law to proceed strictly, and not derogate from my Lord Newport's intent, which plainly appears by the letter of his Will, that his Grand-Child should ask consent of such, he had thereby appointed to consent before her Marriage were solemnized, the actual solemnization of which was an act so permanent, that it would admit of no alteration or dissolution; An act of such force and efficacy, tending clearly and immediately to the ruine of their Right and Title to the Estate in question, and
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rendering it wholly incapable of Reverter by any other means than what the Common and Civil Laws of this Realm do permit. The post-consent therefore will not avail the Plaintiffs in this Court. Otherwise the Defendant claiming by this Limitation, should have indeed advantage, but such as is inconsiderable, being liable to alteration by the pleasure of this Court. And for a strict observation of the Testator's words, the same ought to be in Equity as well as at Law, What great respect the old Heathens paid to the Wills of deceased persons may appear in these following Verses.

Sed Legum servanda fides, suprema voluntas,
Quod mandat, fieri; jubet, parere necesse est.

The Countess saying likely in passion, That she might marry whom she would, &c. did not amount to a dormant Warrant to her to marry without consent. I am upon Conjecture still, that the Plaintiff will insist upon these particulars, for it looks as if they would, because they read them. Doubtless the primary intention of the Clause was in terrorem. But the secondary was, that if she offended, she should undergo the penalty. His intention is to be gathered out of the words only, and what ever they say the Earl intended, does not press the Question. Our Freehold is settled in us by virtue of an Act of Parliament. I lay it down for a Foundation. That a Father may settle his Estate, so as that the Issue shall be deprived of it for Disobedience, and not be relievable in Equity. And now 'tis not possible that any Council could advise a man to do it stronger than it is done in this Case. And shall a Child break these Bonds, and look Disobedience in the face here? If it had been only provided that she should marry with the consent, &c. and no further, it might have been somewhat: But since he goes on, and makes a Limitation over, &c. he becomes his own Chancellour, and upon this difference are all the Presidents, and even those of devising portions, (viz.) devising them over or not, as I have understood. Infancy can be no excuse in case of the breach of a condition of an Estate, in which the Infant is a Purchasor. So that nothing rests now in this Case but the point of Notice. And why should not the Infant be bound to take notice in this Case, as he is to take notice in case of a Remainder, wherein he is a Purchasor? But if notice
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1. Cro 476.
Post 694, 696.

be necessary, it is not to be tried here now. If we had brought an Ejectment, and (supposing notice had been necessary) we had failed in the proof thereof, should we have been barr'd for ever as by this perpetual Injunction we should be? and shall it be done now without proof? If we are not bound to prove Notice at Law, much less are we bound to prove it here. This Case is Epidemical, and concerns all the Parents of England that have or shall have Children, that the Obligations which they lay upon their Children may not be cancelled wholly, and this Court (under colour of Equity) protect them in it, and be a City of Refuge for relief of such; the foulness of whose actions deny them a Sanctuary.

Pecke. If Infancy would excuse, such a Clause would signifie nothing. For must persons especially, of that Sex, marry before full age. The Lords give no reason why they changed their Opinions.

Serjeant Fountain. Yelverton's Case in 36 Eliz. is a Precedent in the Point for us, and Shipdam's Case is much like it. This being of a devise of Land, and that of Dony, which if it were paid, the Land was to go over. The grand Objection is, That here is an Estate vested by a settlement, which is not to be avoided or defeated. But I doubt whether a man can lay such a Restraint, that there shall not be Relief in any case of Emergency and Contingency. It is a part of the fundamental Justice of the Nation, that men should not make Limitations wholly unalterable; as by the Common Law men cannot make a Fee unalienable. You give relief every day where there are expresse Clauses, that there shall be no relief in Law or Equity, where a thing is appointed to be, &c. without relief in Law or Equity, you relieve against them, and look upon them to be void. In our Case, suppose she had married a great Lord, or suppose a person had brought notice of the Trustees consent? would you not have given relief? But secondly, I deny the Assumption. This Case is not so. I agree it had been well done if they had askt my Lady Newport's consent. But is there a word in the Will, that if the Plaintiff did not, he should have no relief in Equity? The Estate was devised to my Lady Newport during her life (so that the Plaintiff could not be in possession) and she might have lived till the Plaintiff was 21 years old. Could not my Lady Newport have said, Have a care how you marry,

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for you forfeit the Estate, if you marry without the consent of two of us three? All Ingredients and Circumstances must be taken in a matter of Equity. Is it an argument to say, He has no Estate? therefore take away his Wifes Estate, then there will be nothing to maintain her.

It is agreed, That if the Approbation had been precedent, it had been well. Now she had no notice before the Marriage, that it was necessary, and when she had that notice, she got the approbation, and that though subsequent, is good enough, because it was askt (and gotten) as soon as she had Notice, that she ought to have it. The Will is hereby sufficiently observed, for the intent of the Will was, that she should have such an Husband as those persons should approve, and this marriage is so approved. I rely upon this matter, but especially upon the word of Notice.

Serjeant Ellis. There was a Case of a Proviso not to marry, but with the consent of certain persons first had in writing. Consent was had, but not in writing, and yet you rul'd it good. Had this been a Condition in Law (as 'tis in fact) the Law would have helped her. If the Estate had been in her, there might have been some reason that she should have been taken notice how it came to her (and of the Limitation, &c.) Had the Earl been alive and consented to the Marriage, after it was solemnized, he would have continued his affection, and the Plaintiffs have had the Estate still. Why now, the consent of the Lords and Countess, is as much as his consent: he had transferred his consent to them. This is a *Rachabitio*, you cannot have a Case of more Circumstances of Equity: 1. An Infant. 2. No notice. 3. Consent after. 4. Their Declaration that they thought my Lord meant it in *terrorem*, &c. What if two of the Trustees had died, should she never have married? surely you would have relieved her.

Serjeant Baldwin. Here is as full a consent to the Marriage, as could well be in this Case. For since the Plaintiff had no notice of the necessity of the Earls consent before the Marriage, it had been the strangest and unexpectedest thing in the world, that she should have gone about to have askt it. The Heir should not have taken notice of such a Forfeiture; and why should a man that is named by way of remainder? In case of a personal Legacy, this were a void Proviso by the Civil Law. For I have informed my self of it.

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It is a Maxim with them, *Matrimonium esse Liberum*. This amounts to as much as the Condition, that the person should not marry at all. For when 'tis in the Trustee's power they may propose the unagreeablest person in the World; 'tis a most unreasonable power, and not to be favoured. Sir Thomas Grimes settled his Land so, that his Son should pay portions; and if he did not, he demised the Lands over, and it was adjudged relievable.

If I limit that my Daughter shall marry with the consent of two, &c. if each of them have a design for a different Friend, if you will not relievè, she can never marry.

Is it not more probable, that if the Earl had lived he would rather have given her a Maintenance, than have concluded her under perpetual misfortune and disherison?

Keeling Chief Justice. I do not see how an averment or proof can be received to make out a mans intention against the words of the Will. In Vernon's Case though it were a Case of as much Equity as could be, it was denied to be received; and so in my Lord Cheney's Case. Here was a Case of Sir Thomas Hatton somewhat like this Case, wherein no Relief could be had.

4 Co. 4. a.
5 Co. 68.
Plo. 345.

Vaughan Chief Justice. I wonder to hear of citing of Presidents in matter of Equity. For if there be equity in a Case, that Equity is an universal Truth, and there can be no President in it. So that in any President that can be produced, if it be the same with this Case, the reason and equity is the same in it self. And if the President be not the same Case with this, it is not to be cited, being not to that purpose.

† Inst. 216.

Bridgman Lord-Keeper. Certainly Presidents are very necessary and useful to us, for in them we may find the reasons of the Equity to guide us; and beside the authority of those who made them, is much to be regarded. We shall suppose they did it upon great Consideration, and weighing of the matter, and it would be very strange and very ill, if we should disturb and set aside what has been the course for a long Series of time and ages.

Thereupon it was Ordered, That they should be attended with Presidents, and then they said they would give their Opinions.

R r 2

Three

Three weeks after they came into Chancery again, and delibered their Opinions Seriatim, in this manner, viz.

Hale Chief Baron. The general question is, whether this Decree shall pass. I shall divide what I have to say into these three questions or particulars. First, I shall consider whether this be a good Condition or Limitation, or conditional Limitation. For so I had rather call it. It being a Condition to determine the Estate of the Plaintiff, and a Limitation to let in the Defendant. I think it is good both in Law and Equity, and my reasons are; first, because it is a collateral Condition to the Land, and not against the nature of the Estate, and she is not thereby bound from Marriage.

Secondly, it obliged her to no more than her duty; she had no Mother; and in case of Marriage she ought to make application to her Grandmother, who was in loco Parentis; and since the Estate moved from the Grandfather, she was Mistress of the disposition and manner of it. 'Tis true by the Civil Ecclesiastical Law, regularly such a Condition were void And therefore, if the question were of a Legacy, there might be a great deal of reason to question the validity of it, because in those Courts wherein Legacies are properly handled, it would have been void. But this is a case of Land. (Devise) Indeed it is agreed, that this is a good Condition, and not to be avoided in it self.

Secondly. This being a good Condition and Limitation over; The Question is, whether there be relief against it in Equity, admitting it were a wilful breach? I think there ought not to be any. I differ from the reasons pressed at the Bar; as first, That it was a devise by Will, by virtue of the Statute, &c. but that doth not stick with me. For if there may not be a relief against a breach of a Condition in a Will, there would be a great shatter and confusion in mens Estates, and some of those settled by great advice, and there have been Presidents of relief in such cases, 2 Car. Fitz *versus* Seymour. And 10 Car. Salmon *versus* Bernard. Secondly, It has been urged, there should be no relief, because there is a Limitation over. But that I shall not go upon neither. There have been many reliefs in such Cases: I will decline the latitude of the Objection, for that would go a great deal further than we are aware. But yet I think there ought to be no relief in this Case: It is not like the case of payment of

of money, because there the party may be answered his debt with damages at another day; and so may be fully satisfied of all that is intended him. But here my first reason is, That it is a Condition to contain the party in that due Obedience, which Law and nature require.

(2) 'Tis a voluntary settlement to the Granddaughter in tail, and the remainder over, is so too; and both these parties are in equali gradu to the Devisor; and therefore their being both in a parity it would be hard to take the Estate from him, to whom, and in whose Scale the Law hath thrown the advantage.

(3) It appears by the body of the Will, that the Earl did as really intend it should go over, if he married without consent, as if he died without Issue: for they are both in the same clause. There may be as much reason to turn it into a Fee-simple, in case as he had died without Issue, as in this case. For so I doubt the penning of this decretal Order does.

And (4) I rest upon this, It is a Case without a President. I remember after that Lanyett's Case had been adjudged that 6 Car. there was a Case, I suppose Saunders *versus* Cornish; of a Limitation in Tail; and than a devise over, and it was adjudged void. And the Judges said, so far it is gone, and we will go no further, because we do not know where it will rest. I know there is no intrinsecal difference in Cases by Presidents. But there is a great difference in a Case, where in a man is to make, and where a man sees, (and is to follow) a President; in the one Case a man is more strictly bound up, but in the other he may take a greater liberty and Latitude. For if a man be in doubt in equilibrio concerning a Case, whether it be equitable or no, in prudence he will determine according as the Presidents have been, especially if they have been made by men of good authority for Learning, &c. and have been continued and pursued. Here must be some boundary, or we shall go we know not whither. It were hard a Court of Equity should do that that is not fit to be done in any Court below a Parliament. The Presidents do not come home to the Case. Most of them are in case of money Legacies; and in some of those Cases we may give allowance, in respect of the Law of another forum, to which they belong. But this is in case of Land only, vid' Swynborne 4 Co. 12. chap. Indeed he is no authority, but there is a very good Exemplification of this matter.

3 Cro. 230. it was of a Lease for years, and so was adjudged void.

(5) I

(5) I shall consider the allays and circumstances which are observed, and offered to qualify this Case, and induce relief.

(1) 'Tis said that this clause was only in *terrorem*, and some Witnesses have been examined to prove it. But I am not satisfied how collateral averments can be admitted in this case. For then how can there be any certainty? A Will will be any thing, every thing, nothing. The Statute appointed the Will should be in writing to make a certainty, and shall we admit collateral averments and proofs, and make it utterly uncertain?

(2) 'Tis said in this Case, the effect of the Proviso has been obtained, for the Trustees have now declared their consent.

I must say it is not full, for they do not say they would have consented; but that possibly such reasons might have been offered as they should have done it. And possibly I say not. They, like good men, have only declined the shewing an ineffectual contradicting of a thing which is done, and cannot now be recalled, undone or altered. Besides, if there had been but a circumstantial variation, the consent afterwards might have been somewhat. But here it is in the very substance. In the Case before cited at the Bar by Mr. Serjeant Ellis, where the consent was to be had in writing, and it was had only by Paroll, there was great Equity that it should be relieved, because it was only a provident circumstance, and wisdom of the Devisor, viz. for the more firm obliging the party to ask consent, which the Devisor considered might be pretended to be had by slight words, in ordinary and not solemn Communication, or else in passion and heat, (as in this case when the Plaintiff would not consent to the approved Marriage with the Lord Morpeth, the Countess said she might marry where she would. Which words imported a neglect of care for the future over the Plaintiff, because she would not be ruled by the Countess in accepting the tender of so commendable a Marriage;) as also for the benefit of the Devisee (in the Case aforesaid) That in case the Devisee did marry with the consent of the Trustee, he might not after (through prejudice, &c.) avoid it by denial of such consent, and so defeat or perplex the Devisee for want of proof of such his consent.

(3) 'Tis said the party is an Infant. Why, an Infant is bound by a Condition in Fact, by Law: 'tis true, we are now in Equity; But in Equity, since this refers to an Act which

which she, though an Infant, is capable of doing. viz. to marry; it were unreasonable that she should be able to do the Act, and not be obliged by Equity to observe the Conditions and Terms which concern and relate to that Act. So that it is all one, as if she had been of full age. The Statute of Merton cap. 5. provides, that Usury shall not run against Infants. and yet the same Statute cap. 6. appoints, That if an Infant marry without the Licence of his Lord, &c. he shall forfeit double the value of his Marriage: and it is reasonable, because Marriage is an Act which he may do by Law while he is under age.

(4) As to the point of Notice: (1) Whether Notice Notice. be requisite or no, in point of Law, I will not determine. But I must needs say, that it must be referred to Law. But (2) If it be not requisite in Law, how far a Court of Equity might relieve for want of it, I will not now take upon me to determine. I will not trench upon matters *Gratis*, of which I know not what will be the consequence. But I conceive in this case, the Fact is not yet settled, whether there were (Notice) or not; and it were a hard matter, That because no Notice is here proved, it should be taken for granted there was none. For here are several circumstances that seem to shew there might be Notice: and a publick voice in the House, or an accidental Intimation, &c. may possibly be sufficient Notice. I shall therefore leave it as a fit thing to be tryed, and till that, the case in my understanding is not ripe. And therefore I will add no more. I think this Decree ought to be altered, if not set aside. But as this Case is, there ought to be no relief.

Vaughan Chief Justice. I shall conclude as my Lord Chief Baron did, That as this case is, there ought to be no relief. I will single out this case from several things not material to it, as my Lord Chief Baron did, &c. I think, if Land be devised on Condition to pay Legacies, and that the Devisee has paid almost all, and satis in one or so, there may be good cause of relief, because he has paid much, and is somewhat in the nature of a purchaser. This is not like a Legacy, This is upon the Statute. Where it is said a man may Devise at his

his Will and pleasure, i. e. absolutely, upon Condition, upon Limitation, or any way that the Law warrants. Suppose there had been a special Act of Parliament disposing as the Earl has done, in this case could there be any colour in Equity, to alter or vary this Law? And here 'tis equally as concluding as that, since the Statute gives a man power to dispose as expressly, and otherwise Equity would alter and dispose of all property, and all things that came in question. But let Notice or Consent, &c. be requisite, or not, 'tis Triable at Law. But I stand upon this, that there ought to be no relief in Equity. It was insisted, that her Grandmother gave a kind of consent: but I take that for nothing; For though the Grandmother would not have offered or proposed a Marriage, yet she ought not to marry without her consent. Nor is the Lords Post-Consent any thing, for consent cannot be had for things which cannot be otherwise, as a man cannot be said to consent to his Statute, or the colour of his hair, &c. A man may know of what Opinion he is, or was; but 'tis impossible, for a man to know of what Opinion he would have been in the circumstances of Action, which he never tryed. I conclude, the Plaintiff ought not to have relief in Equity. But if any matter in Law will help them, they are not excluded from it.

Keeling Chief Justice. I think there ought to be no relief in this Case; I have considered it as well as I can, and I think nothing is more fit to be observed than these Customary Rules for Children, they are very good restraints for Children, and ought to be made good here, to encourage obedience and discourage those who would make a Prey of them; and if there were not hope for men, to hasten their fortunes by this means, there would be few adventures of this nature; I have lookt upon the Presidents, &c. and I find they come not to this Case, except only one, and that is but seven years old, and the other are for money, for which there is reason, because the party may be substantially relieved and satisfied otherways. If there had been no limitation over there may be some reason why it may be intended, that it was only in terrorem.

I do not think all Cases upon Wills are irremediable here (because of the Statute.) If the breach of the Condition be in a circumstance only, as in the Case, where the consent was given, but not in writing, as it ought, it may be relieved, for that was a caution to the Consensor, that he should not
give

give consent before strangers, and trust to the swearing of a parol-consent. I never yet saw any devise obliging to have any such consent after the parties age of 21 years, so that there is no great hardship in it. And if there should be any ill design in those who have the trust and power to consent in with holding their consent, it might be relieved here. I think none would make a decree, that if she died without issue, the Defendant should have it, and this is the same : But equity can never go against the substantial part of a Conveyance or Will, but that must be governed by the parties agreement or appointment. Equity ought to arise upon some collateral or accidental emergent. 'Tis not in Terrorem indeed without a penalty. There can be no collateral Averment. Being an Infant is nothing : for this is only a provision while she is an Infant. Besides, the case of the Forfeiture of the double value is a very good instance for the Notice. If she had notice of this Will, yet they that came to steal her knew it not : for they did not come to take a horn sheep, and therefore no relief is deserved by the Plaintiff. In Honesty and Conscience those Bonds ought to be kept strict. I confess, I would not have the Plaintiff tempted to a further Suit, but indeed in saying that I go further than I need.

Bridgeman Lord Keeper. If I were of another Opinion, yet I would be bound by my Lords ; for I did not send for them, not to be bound by them. But I was of their Opinion from the beginning. And I am glad now that we are delivered from a common Error, and that men may make such provisions as may bind their Children. But to justify the Decree a little : (1) Here is 5000 l. appointed to George Porter, (so that the ample provision was made for him, and it may the rather be intended that this Estate was wholly designed for the Plaintiff.) (2) Here was a Post-consent, and those persons were in loco parentum. Now if the Earl had, as possibly he might have, thus pardoned and been reconciled to the Marriage, he would probably have given the Plaintiff the Estate, and that is a reason to induce us to the same. For I think it clear, that an Estate by Act of Parliament is liable to the same Relief, Regulation &c. as any other Estate. An Estate Tail, though that be by Statute, yet is liable to be cut off, &c. If there had been a time limited, then there had been more reason to bind her up to have consented.

S c

But

But there ought to be a restraint put in these Cases : That of the double forfeiture was truly and well observed : Where no body is bound to give Notice, it is to be taken ; but besides she is not heir, for that might have made a great difference. This I thought not to say. Upon the whole I am of Opinion with my Lords, and I am glad I have their assistance.

Let the Bill be dismissed.

*The Journ. Dom. hoc. 29. Nov. 29.
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PH
MVSEVM
BRITANNICVM

FINIS.

